89-387

No. ____

In The

Supreme Court of the United States

October Term, 1989

ROBERT POSS, et al.

Petitioners-Appellants

MICHAEL HOWARD, et al.,

Plaintiffs-Respondents

v.

JOHN L. McLUCAS, et al.,

Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a consent decree which sets aside promotional positions solely for blacks based upon a predicate of a statistically significant underutilization of blacks violates Title VII and the Constitution?

2. If such statistical underutilization is a sufficient predicate to permit a racial set-aside, was this consent decree sufficiently narrowly drawn to comply with Title VII and the Constitution?

LIST OF PARTIES

Trial Judge

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The Garland Firm, P.C.
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American Federation of Government Employees, AFL-CIO
U. S. Air Force
The Warner Robins Constitutional Rights Fund, Inc. (A nonprofit organization containing over 1100 members)

Parties

Michael Howard, Named Plaintiffs and Class of Black Employees of Warner Robins Air Logistics Center (WR-ALC)

Robert Poss, 137 Named Intervenors-Appellants, and other Non-Black Employees of Warner Robins Air Logistics Center (WR-ALC) Affected by the Consent Decree

The United States of America

The United States Air Force

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Robert Poss and other non-black employees of the Warner Robins Air Logistics Center, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on April 27, 1989. The Petition for Rehearing and Suggestion for Hearing En Banc of that opinion was denied on June 2, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 871 F.2d 1000 (1989), and is reprinted in the Appendix A, *infra.*

The opinion of the United States District Court for the Middle District of Georgia is reported at 671 F. Supp. 756 (1987), and is reprinted in the Appendix B, *infra.*

The judgment of the Court of Appeals for the Eleventh Circuit is reprinted in the Appendix C, *infra.* The Order Denying the Petition for Rehearing and Suggestion of Rehearing En Banc is reprinted in the Appendix D, *infra.*

JURISDICTION

The original action in this case as brought by Plaintiffs/ Respondents alleges violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"); the Thirteenth Amendment and § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; the Fifth Amendment to the United States Constitution (the "Fifth Amendment"); 5 U.S.C. § 7151 and Executive Order 11478; and 5 CFR Part 713. It was brought in the United States District Court for the Middle District of Georgia on October 21, 1975. Subject matter jurisdiction was based on 28 U.S.C. §§ 1331, 1343(4), 1346(a), 1361, 2201, 2202 and 42 U.S.C. § 2000e-16(c). In June, 1984, a consent order and decree was executed and filed. On July 31, 1984, Petitioners moved to intervene alleging that the consent order and decree violated their rights under Title VII and the Fifth Amendment.

The District Court denied Petitioners' motion and Petitioners appealed to the Eleventh Circuit. The Eleventh Circuit reversed in 1986 and the case was remanded to the District Court. *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986). Petitioners thereafter moved to vacate the promotion provisions of the consent decree. The District Court denied Petitioners' motion on September 30, 1987. *Howard v. McLucas*, 671 F. Supp. 756 (M.D. Ga. 1987). *See* Appendix B, *infra.* Intervenors appealed and on April 27, 1989, the Eleventh Circuit entered an opinion affirming the district court's order granting

full approval to the consent decree. *Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989). *See* Appendix A, *infra*.

On May 17, 1989, Petitioners moved for rehearing and suggestion of rehearing en banc, which motion was denied on June 2, 1989. *See* Appendix D, *infra*.

Jurisdiction of the United States Supreme Court to review the judgment of the Eleventh Circuit exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

2. Section 703(a)(1) and (2) of Title VII provide:

> [703(a)] It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case arises from the affirmance by the Eleventh Circuit Court of Appeals of the District Court's denial of the Petitioners' motion to vacate the terms of a consent decree entered in a race discrimination case which sets aside 240 promotions solely for black employees. The Petitioners are non-black intervenors who protested the entry of the decree alleging that it violated their rights under Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Fifth Amendment to the United States Constitution.

The original Complaint in this action was filed by a class of black employees (the "Plaintiffs") alleging discrimination by the United States (the "Government") at Warner Robins Air Logistics Center ("WR-ALC"). In June, 1984, a consent order and decree was filed by the Plaintiffs and the Government. The decree set aside 240 promotions solely for black employees, foreclosing all non-black employees from competing or being considered for promotion to any of those positions. Non-black employees (the "Petitioners" or "Intervenors") sought and were denied intervention. *Howard v. McLucas*, 597 F. Supp. 1501 (M.D. Ga. 1984).

The District Court approved the entry of the proposed consent order and decree, including the exclusion of the intervenors from consideration for promotion to the 240 black-only positions. *Howard v. McLucas*, 597 F. Supp. 1504 (M.D. Ga. 1984). Intervenors appealed and the Eleventh Circuit reversed the District Court's denial of intervention. *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986).

On remand, the Petitioners' moved to vacate the promotion provisions of the decree. The District Court denied the motion and approved the promotional provisions of the decree on September 30, 1987. *Howard v. McLucas*, 671 F. Supp. 756. Petitioner's appealed, challenging the decree on the basis that it violated both Title VII and the Fifth Amendment of the Constitution. The Eleventh Circuit upheld the race-conscious set-aside finding that it violated neither the Constitution nor Title VII. *Howard v. McLucas*, 871 F.2d 1000 (11th Cir. 1989).

The Predicate For Relief

The consent decree in dispute was founded upon a record which contains no evidence of intentional or egregious discrimination. To establish a factual basis for the Court's approval of the proposed decree, the parties to the settlement placed before the Court certain agreed-upon stipulations of fact. The Court's order approving the consent decree, reported as *Howard v. McLucas*, 671 F. Supp. 756 (M.D. Ga. 1987), notes that Plaintiffs' analysis, controlling for occupational series, showed statistical disparities in WG grade groupings 1-4, 5-8,

9-12, and G3 grade groupings 1-4 for blacks employed from 1971 through 1979, but no statistically significant disparities in any GS grade grouping. The Plaintiffs concluded from this analysis that 234 jobs had been lost to blacks. 671 F. Supp. at 760, 761. The record reveals no year-by-year breakdown of promotions indicating whether the promotion shortfall was attributable to only one or two years or whether the rates of promoting blacks out of the source jobs were consistent over the relevant years.

The Government had earlier developed statistical evidence which it contended reflected that no pattern existed which would indicate that blacks were treated in a substantially different manner than non-blacks with regard to promotions. Because the Government decided to settle the matter and supported the decree, it did not cross-examine Plaintiffs' experts, nor did it present its rebuttal experts to contest the figures provided by the Plaintiffs. At no time, however, did the Government ever admit to any discrimination. At page 2 of the consent decree, it is recited that:

> In agreeing to the settlement of this litigation, defendants are not admitting liability, or any past or present discrimination; but to the contrary, assert the validity of their denial of the allegations of the complaints as well as the validity of the defenses they asserted in connection with this litigation.

Further, in paragraph 8 of the decree, it is stated that:

> Neither the terms of this settlement nor defendants' agreement to enter herein shall be interpreted as an admission or a finding by the Court that defendants' personnel policies, practices, or procedures have resulted in adverse impact on any class member or have not been validated in a manner consistent with appropriate guidelines.

No evidence was presented at any time that the statistical deficiency asserted by the Plaintiffs in a small number of job categories had anything to do with "old patterns of segregation and hierarchy." Indeed, the Government had an active affirmative action program at WR-ALC pursuant to which special programs were implemented with the goal that all minority groups be provided the opportunity to par-

ticipate fully in all employment opportunities provided at WR-ALC. Additionally, WR-ALC had maintained an "upward mobility" program to provide training and encouragement for all individuals in lower-level positions to develop the skills and confidence to move on to higher-level and better-paying jobs. Inasmuch as blacks held a greater proportion of GS-8 positions and below, they clearly had been the primary beneficiaries of the "upward mobility" program.

Based upon Plaintiffs' unrebutted statistics, the Court found that a *prima facie* case of discrimination existed and approved the consent decree stating that the non-victim race-conscious relief was clearly authorized. 671 F. Supp. at 766.

The Terms of the Decree

The decree entered by the Court had, among other things, the following provisions:

(1) 240 black class members are to be promoted into 38 different target positions from 38 specially-constructed registers consisting solely of black class members;

(2) For each of the 240 promotions, only black class members are eligible for consideration;

(3) The promotions to be awarded on the basis of race alternate with merit-based promotions of both blacks and non-blacks, such that every other promotion is from the black-only promotion register;

(4) Each race-conscious promotion register was created by rank-ordering class members pursuant to a system established by the decree.

The class consists of approximately 3,200 black employees who were hired prior to January 1, 1980. None of these employees were identified as having been denied any promotion to any particular position or having been the victim of discrimination. Indeed, paragraph 15 of the conclusions of law contained in the District Court's order originally approving the consent decree states that:

> The actual victims cannot be identified due to the very nature of the Warner Robins promotion scheme, *i.e.*, there are no applicants for promotions.

597 F. Supp. at 1514.

Further, the parties to the decree contended that they could not identify victims because sufficient records had not been maintained by the Government to identify class members excluded from promotion unfairly. 671 F. Supp. at 763. Unable to identify actual victims, plaintiffs and defendants settled upon the process whereby they would seek to approximate victim specificity.

First, the promotions were to go to blacks who had been employed on a part- or full-time basis for at least one day between 1971 and 1979. The decree did not take into account the length of time that the individual was employed at WR-ALC and so did not consider the length of time to which any employee was exposed to the allegedly discriminatory practice.

After identifying that individual as a potential promotee, the consent decree specifies the process by which the individual would be rank-ordered for promotion. First, the Government was to identify all class members who met the minimum eligibility requirements for the promotions as of 1983. There was no requirement, however, that the employees be identified who met minimum eligibility requirements for the positions during the 1971 through 1979 relevant period when (s)he might be have been discriminatorily denied a promotion.

The class member is then re-ranked by weighing supervisory appraisals as of 1983 (and not appraisals during the 1971 through 1979 relevant period). Finally, the employee is to be ranked pursuant to his or her seniority. The seniority utilized was the "service computation date" which is the date on which an individual first makes a contribution toward a federal pension. This seniority includes military service and work for any federal agency or facility. It generally applies to any time during which one is a federal employee. Accordingly, the seniority utilized for the rank-ordering of class members includes the employment time at WR-ALC (where the discrimination was alleged to have occurred) and other federal government employment including military service.

The consent decree failed to consider when a class member moved into or out of a source position so as to be exposed to the factors giving rise to the statistical shortfall in promotions. Class members who were in a source position for a short period of time where there

was a statistical imbalance found were given the same ranking as class members who had been in a such a position throughout most or all of the relevant time. The decree also did not take into account special circumstances such as leaves of absence from WR-ALC where a class member might not even have worked at WR-ALC for most or all of the 1971-1979 period.

These failings could have been addressed in the decree, but were not. To do so, the parties to the decree needed only to review personnel files and computer records to determine the personnel actions such as the date of hire at WR-ALC; date of promotion or demotion out of or into a source position; and date of any leave of absence, suspension, or other break of service in a source position. The accumulation of that data would have resulted in a WR-ALC seniority date bearing a close relationship to the underutilization in the case. While it would not identify victims, it would have ensured that individuals not exposed to the offending practices were not highly ranked for set-aside positions.

The decree agreed upon by the Plaintiffs and the Government causes some of the Petitioners to be denied consideration for 50% of the next 480 promotions to the target positions. Some Petitioners, in fact, did receive promotions and, of necessity, those promotions were delayed for unidentifiable periods of time, while others are being postponed in on-going promotional processes. These postponements reduce the compensation of affected Petitioners at the estimated value of $1,500 per year. Additionally, the postponements affect the pension payments petitioners receive upon retirement because, under the Civil Service Retirement System Act and the Federal Employees Retirement System Act of 1986, retirement benefits are computed by averaging the high 3-years' salary and multiplying that base by the appropriate number of years in service. Further, if layoffs occur, delayed promotions may mean that certain petitioners will be layed off or downgraded who would otherwise retain their jobs. Competing employees at WR-ALC are released for a reduction in force in inverse order of the ranking on retention registers. Finally, because merit based promotional registers are reconstituted with regularity, a promotion delayed is often a promotion denied. Under the consent decree, special promotions from the black-only promotion list are substituted for half of the merit promotions until the number of black-only promo-

tional slots are filled. The promotion roster of rankings set by the decree never changes once set. The merit promotion roster, however, changes as often as every six months. The result of these two rosters working in tandem is that some non-black employees who would have been promoted but for the consent decree may be permanently denied promotions.

Finally, there is no evidence that the parties to the decree considered any race-neutral alternatives which would have reduced the burden of the operation of the decree upon the Petitioners. They did not consult with the Intervenors as to alternative relief proposals but instead went forward on the basis that race-conscious set-asides were mandatory.

The Ruling of the District Court

The District Court approved the decree on two grounds. First, it found that notwithstanding the settling parties' failure to identify any victim of discrimination, the decree was valid as make-whole relief. Alternatively, the District Court upheld the decree as satisfying both Title VII and constitutional requirements on the theory that a manifest imbalance had been established and the consent decree ensured fair treatment of minorities and non-minorities. 671 F. Supp. 756.

The Ruling of the Court of Appeals

The Eleventh Circuit panel first addressed the Intervenors' constitutional challenge to the decree, finding that the decree "must be considered equivalent to a voluntary affirmative action plan" (871 F.2d at 1006) and, therefore, a factual determination had to be made that the government had a strong basis of evidence for its conclusion that the plan as set out in the decree was necessary (871 F.2d at 1007).[1]

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[1] Surprisingly, the panel briefly addressed the issue of standing, stating that Petitioners had tenuous standing to contest the decree because they did not prove that any particular Intervenor was denied a specific promotion by the operation of the decree. In *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986), the panel allowing intervention concluded without reservation that Intervenors had standing. "Intervenors-Appellants claim they are ineligible for these promotions solely on account of race because non-discriminatee class members are eligible for the target positions.

The panel stated that the strong basis was satisfied when the district court found that a *prima facie* case had been established by the statistical showing. *Id.* Using that statistical imbalance as a predicate, the panel found that under strict scrutiny, the racial preference was sufficiently narrowly tailored to meet the requirements established by *United States v. Paradise*, 480 U.S. 149 (1987).

The panel then summarily disposed of the Intervenors' Title VII challenge, holding that because the set-aside passed constitutional muster, it could not violate Title VII.

Although the panel's decision was issued on April 27, 1989, the Court did not consider the Supreme Court's January 23, 1988 decision in *City of Richmond v. J. A. Croson*, 109 S.Ct. 706 (1989) assessing the constitutionality of a governmental affirmative action plan and discussing the predicate required before a racial preference may be approved.

We hold that this is sufficient to confer standing to intervene." *Id.* at 959. This decision is the law of this case. *See Hildreth v. Union News Co.*, 315 F.2d 548 (6th Cir. 1963).

It is not disputed thast the Intervenors have suffered some injury: both the District Court and the panel found that at least 30 of the 137 named Intervenors had been promoted to and so clearly were qualified for the target positions. See *Howard v. McLucas*, 671 F. Supp. at 767 n. 4; *Howard v. McLucas*, 871 F.2d at 2204 n. 6. By operation of the decree and because of their race, however, the Intervenors could only be promoted to 50% of the target positions available. Those merit register promotions were made only to every other available target position; *a fortiori* positions of the Intervenors who have been promoted to target positions were delayed. *See Howard v. McLucas*, 671 F. Supp. at 767; *Howard v. McLucas*, 871 F.2d at 1005. This injury confers standing. Furthermore, Intervenors did not need to prove they would have been promoted but for the decree: their injury arises from the decree's mandate that they cannot even *compete* for 50% of the promotions solely because of their race. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 280 at n. 14 (1978). Such an exclusion was also found to be impermissible in *City of Richmond v. J.A. Croson Company, supra*, where the court found that the plan denied "certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race." 109 S. Ct. at 721. (Emphasis added) *See also DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting) ("Whatever his race, he had a constitutional right to have his application considered on its merits in a racially neutral manner.")

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents an Important Federal Question That Has Not Been, But Should Be, Decided By This Court.

This case first presents an important question of federal constitutional (Fifth Amendment) and Title VII [42 U.S.C. § 2000(e) *et seq.*] law which has not been, but should be, expressly decided by this Court:

> Whether a consent decree which sets aside promotional positions solely for blacks based upon a predicate of a statistically significant underutilization of blacks violates Title VII and the Constitution.

This Court has now firmly established the constitutional and Title VII standard that some form of race-conscious affirmative action relief may be based upon a sufficiently strong evidentiary predicate of discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987).

In the constitutional setting, this Court has on several occasions considered whether the evidence in the record would support a race-conscious set-aside. In three such cases, governmental set-aside plans were rejected as unconstitutional because there was insufficient probative evidence of any discrimination and therefore no predicate for any relief, much less race-conscious set-asides or quotas. *City of Richmond v. J.A. Croson Company*, ____ U.S. ____, 109 S. Ct. 706 (1989); *Wygant v. Jackson Board of Education, supra*; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The set-asides were approved by this Court in two other cases where the race-conscious governmental action was predicated upon a prior finding of long-standing, deliberate and egregious discrimination, punctuated by intransigent resistance to efforts aimed at remedying

such discriminatory conduct. *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986).[2]

This petition presents an issue which falls squarely between this Court's rulings in *Paradise* and *Sheet Metal Workers* on the one hand and *Croson*, *Wygant*, and *Bakke* on the other. In this case, despite no finding of long-standing, egregious or deliberate discrimination by recalcitrant discriminators as in *Paradise* and *Sheet Metal Workers*, the Eleventh Circuit approved the constitutionality of a racial set-aside based simply upon a *prima facie* statistical case. Thus, unlike previous constitutional affirmative action cases addressed by this Court, this case presents the question of whether consent decrees providing for racial set-asides are constitutionally permissible based upon a statistical predicate, without any showing of egregious, deliberate discrimination by a recalcitrant discriminator.

This same issue is presented under Title VII. In *Sheet Metal Workers*, this Court also found that egregious, long-standing and deliberate discrimination and a refusal to comply with remedial court orders was a sufficient predicate to permit a racial set-aside under Title VII.[3] This Court has also addressed, and upheld under Title VII, two voluntary affirmative action plans where the predicate consisted of statistical evidence. *Johnson v. Transportation Agency, supra*; *Steelworkers v. Weber*, 433 U.S. 193 (1979). However, unlike the raw promotional racial set-asides approved by the Eleventh Circuit in

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[2] In *Fullilove v. Klutznick*, 448 U.S. 448 (1986), this Court reveiwed a federal government minority set-aside program, upholding it, *inter alia*, on the grounds that Congress had made a finding that a nation-wide history of past discrimination had reduced minority participation in federal construction grants and that the Congress had the power under § 5 of the Fourteenth Amendment to employ race-conscious remedial relief. Because this case does not involve any Congressional action such as found in *Fullilove*, the Court's analysis in that case is not directly applicable to or controlling of this case.

[3] In so holding, this Court stated "[w]hether there might be other circumstances that justify the use of court-ordered affirmative action is a matter which we need not decide here." *Local 28, Sheet Metal Workers v. EEOC*, *supra* at 476. In *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1988), this Court indicated that a consent decree could possibly provide broader relief than could a court under § 706(g) of Title VII, but went on to provide that parties to a decree could not take any action that violates Title VII or the Constitution.

this case, the *Johnson* and *Weber* plans only permitted treating race as a "plus factor" in promotional decisions or gave limited racial priorities in newly established affirmative action training programs.

This case thus presents in both the Constitutional and the Title VII setting an issue that has yet to be decided by this Court — whether the remedy of racial set-asides or quotas is permissible under either the Constitution or Title VII based solely upon the predicate of statistically significant underutilization. This question is an important one deserving review by this Court.

The question of what predicate is necessary under Title VII and the Constitution before a set-aside remedy may be considered lawful is an important question of affirmative action law that should be addressed for at least two fundamental reasons.

First, the consequences of a mistaken standard can be extremely costly to both public and private employers and to society as a whole. *See Hammon v. Barry*, 841 F.2d 426 (D.C. Cir. 1988). Racial preferences, by their very nature, involve the most central and sensitive area of employment law — the employee selection processes. The ability of a public or private entity to favor one race over another goes to the very core of the employment process. These decisions affect and, in many cases, control not only the financial well-being and self-esteem of the parties involved, but of necessity affect the resulting relations between employees of difference race, national origin or gender. Employment decisions which are made pursuant to a standard which improperly favors one class of employees over another based upon immutable characteristics inevitably lead to business and social ills ranging from production issues to employee strife. This Court, therefore, should address this question and establish a standard which resolves this fundamental issue of employment law.

Second, litigants who seek to settle employment cases also need a clear standard upon which to base such settlements. In a substantial portion of employment litigation today, plaintiffs' proof consists primarily of statistical evidence of underutilization. While this Court has held that under both the Constitution (*City of Richmond v. Croson*, *supra*) and Title VII (*Johnson v. Transportation Agency*, *supra*) some form of voluntary relief may be predicated upon a statistical showing, this

Court has yet to make a definitive holding approving or disapproving set-asides such as those sanctioned by the lower court in this case without proof of long-standing, egregious or deliberate discrimination.

The absence of a definitive standard is particularly important in this area given this Court's holding in *Martin v. Wilks*, ____ U.S. ____, 109 S.Ct. 2180 (1989). In *Wilks*, this Court held that non-parties to settlement agreements and consent decrees may attack racial set-asides or quotas for substantial periods after the agreements have been entered. Following the *Wilks* decision, parties to employment litigations have been and will continue to be very reluctant to settle cases presenting affirmative action issues absent express guidance from this Court as to the strength of the evidence necessary to support racial set-asides. If the parties settle without this guidance and include any form of racial set-asides, they expose themselves to years of further collateral litigation, despite attempts to buy peace through settling the original case. This, of course, undercuts the basic public policy favoring settlements and provides a further strong basis upon which this writ should be granted. *Johnson v. Transportation Agency*, *supra* at 640, 641.

II. The Decision Below Conflicts With The Decisions Of This Court With Regard To The Predicate Required for Racial Set-Asides.

A. The Decision of the Eleventh Circuit is Inconsistent With The Constitutional Standards Established By This Court.

1. *This Court's Prior Constitutional Affirmative Action Decisions.*

While this Court has not expressly decided whether racial set-asides may be predicated upon simple proof of a statistical underutilization, it has made it clear that racial preferences are remedies of the last resort and are to be used only in the most "extreme" circumstances. *City of Richmond v. Croson*, *supra* at 729.

In rejecting the city's racial set-aside plan in *Croson*, this Court reaffirmed its decisions in *Paradise* and *Sheet Metal Workers* that

"some sort of narrowly tailored racial preference" was constitutionally permissible in "extreme" circumstances. *Id.* In *Croson*, however, this Court decided that *all* racial classifications, regardless of victims or beneficiaries, are suspect and require strict judicial scrutiny. Accordingly, governmental racial classifications of every type are required to be analyzed on a strict scrutiny basis, and will be upheld only if they are both justified by a compelling purpose and are narrowly tailored. *Id.* at 721.

Under the first prong of the strict scrutiny test, this Court made it clear that a compelling governmental purpose is critical in analyzing all racial classifications because "preferential programs may only reinforce common stereotype holdings that certain groups are unable to achieve success without special protection based upon a factor having no relation to individual worth." *Regents of the University of California v. Bakke, supra* at 298. Stated otherwise, "[c]lassifications based upon race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *City of Richmond v. Croson, supra* at 721. Yet again Justice Stevens observed in *Fullilove* that "because classifications based on race are potentially so harmful to the entire body politic, it is especially important that reasons for such classifications be clearly identified and unquestionably legitimate." *Fullilove v. Klutznick, supra* at 534, 535 (Stevens, J., dissenting). It is for this reason that this Court has declared racial classifications "presumptively invalid." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 254, 272 (1979).

Not only do these racial classifications carry with them an inherent danger of stigmatic harm to the beneficiaries, those disadvantaged by the racial classifications are often simply innocent victims themselves whose individual rights as guaranteed by the Constitution are being abused. *Regents of the University of California v. Bakke, supra* at 320. *See* Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312 (1986).

This Court, having made it clear that racial classifications are inherently dangerous when used in non-remedial settings which do not constitute a compelling governmental purpose, has several times

spoken as to what must be established to constitute a sufficiently compelling basis for such race-conscious affirmative action relief.

In *United States v. Paradise, supra*, a compelling interest was found and the narrowly tailored race-conscious relief was sanctioned by the Court where there was a judicial finding of pervasive, systemic, and intentional discrimination by the Alabama Department of Public Safety, and a consistent history by the Department of resistance to court orders and failure to comply with judicially approved commitments. Similarly, in *Local 28, Sheet Metal Workers v. EEOC, supra*, the union was repeatedly found guilty of discriminating against minorities and held in civil contempt for its bad faith refusal to comply with numerous remedial court orders. The Court of Appeals in that case found that the union had "consistently and egregiously violated Title VII." *EEOC v. Local 28 of the Sheet Metal Workers International Association*, 753 F.2d 1172 at 1186 (2d Cir. 1985). With discrimination predicates established at those extreme levels, this Court held in each case that narrowly tailored racial classifications could be constitutional. *Local 28, Sheet Metal Workers v. EEOC, supra.*

To make it clear, however, that racial preferences and classifications were to be limited only to factual circumstances as compelling as *Paradise* and *Sheet Metal Workers*, the plurality opinion in *Croson* reaffirmed the limitation the Constitution places on use of racial classifications. Specifically, the plurality opinion in *Croson* states:

> In *extreme* cases, some form of narrowly tailored racial preference *might* be necessary to break down patterns of *deliberate* exclusion.

109 S. Ct. at 729 (emphasis added).

The *Croson* decision thus left little doubt but that racial preference affirmative action decrees are constitutionally limited to extreme cases of deliberate discrimination in the mold of *Paradise* and *Sheet Metal Workers*.

Furthermore, the plurality opinion in *Croson* underscored that point when it addressed the question of whether statistical underutilization — as found in this case — may serve as a predicate for

racial set-asides. 109 S. Ct. at 729. Justice O'Connor's opinion clearly provides that cases merely presenting proof of statistical underutilization do *not* constitute the *extreme* deliberate cases of discrimination that would authorize narrowly tailored racial preferences; and, therefore, where proof is limited to statistics, the settling parties are to avoid racial set-asides and quotas in shaping remedies to dismantle the system giving rise to the discrimination.

2. *The Eleventh Circuit Decision.*

Notwithstanding this clear road map, the Eleventh Circuit chose to create its own trail — a trail that Petitioners submit ends in unconstitutional racial set-asides. The record below reveals nothing in the way of egregious, pervasive, extreme, or deliberate discrimination on the part of the governmental defendant and there was certainly no resistance to or refusal by the Government to comply with any court orders. The Eleventh Circuit relied solely upon statistical imbalance found at significant levels in 10 of 51 job groups. Such a finding carries with it no inference that the underutilization was intentional or deliberate.

Indeed, the record reflects quite the contrary. The Government had in place its own affirmative action plan, an outreach program for minorities, an equal opportunity office for complaints and a grievance procedure. The testing program claimed to be discriminatory by the plaintiffs had been replaced and the Government had offered a fund for payments to class members. The record here bears no relationship to the conduct of the defendants in either *Paradise* or *Sheet Metal Workers*.

Yet, in the face of this record, the Eleventh Circuit sanctioned the consent decree and in doing so established a standard for affirmative action plans in this Circuit that permits a statistically significant showing of underutilization of blacks standing alone to constitute a predicate that is equivalent to an "extreme case" of "deliberate" discrimination. It is a decree not aimed at dismantling a system that gives rise to statistical underutilization; but rather is a decree having as its purpose the promotion of blacks regardless of effects of the system upon them.

To permit race-conscious relief in the form of set-asides and quotas based upon this record is to open the door for such relief in all cases where statistically significant underutilization is found. Under the Eleventh Circuit's standard, racial preferences become the rule — not the remedy of last resort. The Eleventh Circuit's interpretation is a perverse twisting of this Court's prior constitutional rulings and merits this Court's review.[4]

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[4] Plaintiffs, earlier in this litigation, argued that Title VII is the exclusive remedy for Federal employees alleging discrimination, relying upon *Brown v. General Services Administration*, 425 U.S. 820 (1976). In *Brown*, a federal employee filed a discrimination action asserting claims pursuant to Title VII, the Declaratory Judgment Act, and 42 U.S.C. § 1981. The Court held that Title VII was the plaintiff's exclusive remedy. The plaintiff did not, however, assert a constitutional challenge and so the issue presented in this case was never addressed by the Court. The only question before the Court in *Brown* was the viability of the claim pursuant to 42 U.S.C. § 1981.

Recognizing this, the court in *Krenzer v. Ford*, 429 F. Supp. 499, 501 n. 1 (D.D.C. 1977), found that while Brown "establishe[d] Title VII as the sole *statutory* remedy against the Government for race . . . discrimination in employment . . . [it] *does not foreclose plaintiff's constitutional rights*". (Emphasis added.)

The logic supporting this distinction is obvious: As all parties to this case readily acknowledge, constitutional claims, like the ones presented by Appellants, stand apart from Title VII claims because the standards and the analysis under the Fifth Amendment are different from that under Title VII. In *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), the court found that constitutional standards requiring that race-conscious actions by employers be narrowly tailored to meet compelling governmental interests apply to the federal government even in employment cases. It is clear, therefore, that a court could find a federal government employee to have been discriminated against in violation of the Constitution when that same employee has not been found to be a victim of Title VII discrimination. Moreover, with respect to those claims of appellants who have not yet been adversely affected by the decree and whose claims are still prospective in nature, Title VII procedures may not yet be available. To the extent that such claimants are "expressly unprotected by the statute," their Fifth Amendment claims are very much alive and should be protected by the Constitution. *Doe v. U.S. Postal Service*, 37 F.E.P. Cases 1867 (D.D.C. 1985), citing *Davis v. Passman*, 442 U.S. 228 (1978).

B. The Decision Of The Eleventh Circuit Is Inconsistent With The Title VII Standards Established By This Court.

1. *This Court's Prior Title VII Affirmative Action Decisions.*

While the Eleventh Circuit opinion did not provide a specific framework for analyzing the Title VII issues of this case, it did hold that because the consent decree was constitutional, it necessarily did not violate Title VII. In doing so it, of necessity, held that Title VII permits a racial set-aside remedy based upon a predicate of statistically significant underutilization. This Court has never sanctioned such a standard under Title VII and such a holding is inconsistent with this Court's teachings in *Johnson v. Transportation Agency, supra.*

As previously noted, this Court has sanctioned as nonviolative of Title VII race-conscious goals based on proof of long-standing, egregious, deliberate and pervasive discrimination. *Local 28, Sheet Metal Workers v. EEOC, supra.* In *Johnson v. Transportation Agency, supra,* it also approved the use of race as a "plus factor" based upon a predicate of "manifest imbalance." It has not, however, sanctioned racial set-asides or quotas based solely upon a manifest imbalance or statistical *prima facie* case. A review of *Johnson* demonstrates that such a predicate will not support racial set-asides or quotas.

The affirmative action plan reviewed by this Court in *Johnson* was based upon a statistical underrepresentation of minorities and females in certain job groups at the defendant agency. Unlike the consent decree here at issue, that plan did not set aside any position solely for minorities or females. In approving the plan, this Court made it clear that a fundamental factor in its approval was the fact that sex was only one of several factors — including test scores, expertise, prior performance and other realistic factors — to be taken into consideration in the promotional process and that the plan did not guarantee any promotion based solely on gender. 480 U.S. at 637, 638.

The Court in *Johnson* also spoke to the type of relief that would *not* be approved where the predicate is a statistical imbalance. In

reply to Justice Scalia's contention in his dissent that the majority adopted the standard that underutilization is a sufficient predicate for all types of affirmative action relief, the majority states:

> *Firefighters [Local 93, International Association of Firefighters v. City of Cleveland*, where egregious, deliberate discrimination was the predicate] raised the issue of conditions under which parties could enter into a consent decree providing for explicit numerical quotas. By contrast, the affirmative action plan in this case sets aside no positions for minorities or women.

Johnson v. Transportation Agency, 480 U.S. at 631 n. 8.

Thus, this Court made it clear in *Johnson* that the predicate that will support the explicit numerical quotas found in this decree is egregious, deliberate discrimination, not simply the underutilization predicate found in *Johnson*. *J.A. Croson v. City of Richmond*, 822 F.2d 1355, 1362 (4th Cir. 1987).

Throughout *Johnson*, this Court repeatedly reaffirms this point. For example, the *Johnson* opinion specifically states that this Court would reject, as violative of Title VII, a plan that had mere underutilization as its predicate, if that plan did not permit taking into consideration distinctions and qualifications of *all* candidates for promotion. A plan that simply calculated underutilization and then set aside positions based on the shortfall would impermissibly "dictate mere blind hiring by the numbers" and would, in effect, constitute the quota found unacceptable by Justice O'Connor in *Sheet Metal Workers*. *Johnson v. Transportation Agency*, *supra* at 636. The Court also reaffirms this point where it provides that the *Johnson* plan would not have been acceptable if it had been implemented "solely by reference to statistics". *Id.* at 637.[5]

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[5] *Weber* is consistent with the holdings of *Johnson*. The *Weber* plan arose when the employer, who had a statistical imbalance in its work force, agreed to establish a new apprenticeship training program and reserved fifty percent of the new training slots for blacks. The actual hiring process, however, was unaffected by the new training program. As stated by the Ninth Circuit, the *Weber* plan did not adversely affect white employees at all because "it created additional opportunities by establishing new training programs for both blacks and whites." *San Francisco Police Officers*

2. *The Eleventh Circuit Decision.*

In finding that Title VII is not violated by the imposition of racial set-asides without a finding of egregious, deliberate discrimination, the Eleventh Circuit has disregarded this Court's Title VII admonitions announced in *Johnson*. It approved a consent decree that has as a predicate a determination that in 10 of 51 job groups the promotion rate of blacks was statistically lower than would have been expected had selections been strictly random. The settling parties then calculated the shortfall and set a black-only quota based on that shortfall, setting aside 240 positions solely for blacks and barring non-blacks from any consideration for those positions.

By approving this racial set-aside plan, the Eleventh Circuit has permitted that which *Johnson* disapproved — it approved the calculation of imbalances in certain job groups according to the population of blacks in the labor pools, and then directed that promotions be blindly implemented based on such statistics. This process was specifically rejected in *Johnson*. *Id.* at 637. In so holding, the Eleventh Circuit sets a standard that is not only inconsistent with this Court's prior decisions, but also a standard that permits racial set-asides to be the rule and not the exception reserved for extreme cases.

III. The Decision Below Conflicts With The Decisions of This Court With Regard To Narrow Tailoring.

A second important question is presented by this petition:

> If such statistical underutilization is a sufficient predicate to permit a racial set-aside, was this consent decree sufficiently narrowly drawn to comply with Title VII and the Constitution?

Assn. v. San Francisco, 812 F.2d 1125, 1132 (9th Cir. 1987). Thus, through the program *new* opportunities were created for whites, not lost. Furthermore, the company could consider all employees, black and white, for each new hire position that opened up. There was no obligation for the employer to hire minorities at any rate. Its only obliation was to leave the training program in place until the statistical imbalance in its workforce was remedied.

A. The Consent Decree Is Unconstitutional Because It Is Not Narrowly Tailored.

1. *The Eleventh Circuit's Failure to Consider Race-Neutral Alternatives Violates Constitutional Standards Set by This Court.*

This Court has repeatedly stated that in determining whether race-conscious remedies may be appropriately employed, there must, prior to the implementation of the affirmative action, be at least some meaningful consideration of the circumstances justifying such relief.

For example, in *United States v. Paradise, supra*, this Court held that in considering whether the relief was narrowly tailored, the district court was required to make a determination of the "efficacy of alternative remedies" before its approval of a racial quota. 480 U.S. at 171. In *Fullilove v. Klutznick, supra*, this Court's principal opinion noted that Congress had actually unsuccessfully tried some race-neutral alternatives and had "carefully examined and rejected [other] race-neutral alternatives" before analyzing the set-asides. 448 U.S. at 463-467. In *City of Richmond v. Croson, supra*, this Court expressly considered whether race-neutral objectives had been considered prior to the City's enacting its set-aside plan and noted that "there is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota." 109 S.Ct. at 728.

These cases unquestionably stand for the proposition that because race-conscious remedies are so disfavored, prior to their implementation, race-neutral remedies must be thoroughly explored; and, if rejected, such a conclusion be reached only after a careful determination that such remedies offer no likelihood of success. *Barhold v. Rodriquez*, 863 F.2d 233 (2d Cir. 1988); Days, D., *Fullilove*, 96 Yale L.J. 453, 459 (1987).

Despite this clear direction from this Court, the Eleventh Circuit chose to ignore the failure of the Government and the Plaintiffs to undertake any consideration of several available race-neutral remedies. Further, it did so under circumstances where race-neutral alternatives could have been successful in increasing the utilization rates of

minorities. Changes in job description or in the promotion process itself could have been used as alternatives that could lead to greater minority participation. Special training and apprenticeship programs funded by the Government were other options that would assist minorities to increase their promotion rates. *See generally* 41 CFR 60-2.20-2.26.

Furthermore, even using set-asides, there were alternatives that would have ameliorated the effects of the race-conscious relief on innocent non-blacks. For example, simultaneously with the promotion of blacks from the black-only promotion list, promotions could have been made off the merit promotion list [*see Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986)]; or the number of overall promotions could have been increased (*see Local 93, International Association of Firefighters v. City of Cleveland, supra*); or pay increases or seniority could have been provided to those individuals on the merit promotion list who were adversely affected by the racial set-asides.

None of these alternatives were considered or implemented. Despite this Court's criticism of the City of Richmond in *Croson* that "there is no evidence that [the Government or the Plaintiffs] considered any alternatives to a race-based quota," (109 S.Ct. at 728), the Eleventh Circuit simply ignored the parties' failure to tailor this decree narrowly. Instead, the panel deemed that failure irrelevant.

Further, the Eleventh Circuit rejected Petitioners' alternatives — which were raised during the litigation simply to demonstrate that rational race-neutral alternatives were available to the settling parties — finding that they did not "place plaintiffs in the rightful place nor do they do so expeditiously." 871 F.2d at 1009. In so holding, the Eleventh Circuit erroneously adopted a new standard that requires the race-neutral affirmative action alternatives expeditiously to "place plaintiffs in their rightful place." Such a standard is flatly inconsistent with this Court's ruling in *Sheet Metal Workers*, where this Court pointed out that "[t]he purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Local 28, Sheet Metal Workers v. EEOC, supra* at 474.

Under this erroneous standard, not only is no consideration of race-neutral alternatives required, but any race-neutral alternatives

adopted would have to provide make-whole or immediate rightful place relief. If this Court permits such a standard to survive, race-conscious relief in the Eleventh Circuit will become the remedy of first rather than last resort. Virtually no race-neutral relief ever expeditiously provides "rightful place" or "make-whole" relief as mandated by the lower Court. Such relief is reserved for cases where a victim of discrimination is identified, thereby making the appropriate remedy his/her immediate placement into the position he/she would have held absent the discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman*, 424 U.S. 747 (1976). But where no victim can be identified, as in this case, affirmative action relief must be aimed at dismantling discriminatory systems and preventing further violations of the laws. The Eleventh Circuit opinion sets a standard that distorts this fundamental concept.

2. *The Consent Decree Does Not Satisfy Constitutional Standards For Identifying Victims Of Racial Discrimination.*

Where employment decisions such as the promotions at issue can be made on a case-by-case basis, the plan or decree should treat all candidates individually, taking into consideration whether the beneficiary of the racial preference has suffered from the effects of discrimination. *City of Richmond v. Croson*, *supra* at 729; *Fullilove v. Klutznick*, *supra* at 515. In that regard, *Croson* further provides that where selections can be made on an individual basis, the relief should be made available to those "who truly have suffered the effects of prior discrimination." *City of Richmond v. Croson*, *supra* at 729; *see Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, 876 F.2d 902, 915-16 (D.C. Cir. 1989). Administrative convenience will not justify either arbitrarily including or excluding class members from the benefits of the remedial action. Thus, under *Croson*, in order for relief to be narrowly tailored, the decree must, to the extent feasible, treat candidates for promotions and other selections individually, rather than solely on the basis of race, and must use all available administrative tools to insure that the beneficiaries of the remedial action are persons "who truly have suffered the effects of prior discrimination." *City of Richmond v. Croson*, *supra* at 729; *see Fullilove v. Klutznick*, *supra* at 469-71.

The process which the Eleventh Circuit approved for providing race-conscious relief conflicts with *Croson*. In approving the decree, the Eleventh Circuit ignored this Court's directive that as the reviewing Court, it had an independent duty to examine the decree in accordance with the strict scrutiny standard and determine whether the selection mechanisms of the consent decree awarded relief to class members on a constitutionally permissible basis. *City of Richmond v. Croson*, 109 S. Ct. at 721. That duty included a *de novo* determination by the Eleventh Circuit of whether any failure of the consent decree's process to identify victims was driven by administrative convenience or simply unavoidable under the circumstances.

The Eleventh Circuit did not make such a *de novo* determination. Instead it improperly adopted a "clearly erroneous" standard (*Howard v. McLucas*, 871 F.2d at 1010) and applied that standard to uphold the district court's findings.

If it had adopted the proper standard and made a *de novo* review of the record as required by *Croson*, it would have concluded that the decree's methodology for finding proxies for actual victims (actual victims not being ascertainable) did not meet constitutionally-mandated narrow-tailoring standards.

Among the decree's failures is its method of selecting class members who were to receive promotions from the black-only set-aside list. The decree allowed any black who had been at WR-ALC one or more days during the relevant 1971-1979 period to be eligible for promotion. Rather than analyzing each individual on a promotion-by-promotion basis and seeking to determine at least whether the individual was eligible for promotion during the relevant period, the decree ranked class members for promotion by their governmental (not WR-ALC) seniority and performance in 1983.

In structuring the decree in this fashion, the authors of the decree theorized that those class members who had the greatest seniority at the facility during the 1971-1979 period under consideration would have had the greatest probability of being affected by the challenged promotional practices, and that they should therefore be given priority ranking on the black-only promotion list. However, the parties to the decree chose, for administrative reasons, not to determine for what period each class member was actually employed in a relevant

position at WR-ALC. Instead they used the retirement seniority date for each class member already in the government computers — *i.e.*, overall federal governmental seniority — not WR-ALC seniority. This meant that a black who transferred to WR-ALC on December 31, 1979 after, for example, 20 years of employment in the military, postal service, or some other federal service, was ranked higher on the black-only promotion list than a class member who had the same evaluation in 1983 but who worked in a relevant position during the entire 1971-1979 period.

Clearly the decree's selection process was not narrowly tailored to identify those class members who had suffered the effects of past discrimination at WR-ALC during the relevant 1971-1979 period. The decree's terms are driven by administrative convenience, not by an effort to identify those who suffered the effects of discrimination.

In approving this decree, the Eleventh Circuit has again adopted an incorrect standard which is inconsistent with the mandate of this Court to reject administrative convenience as an excuse for not identifying those who actually experienced the effects of discrimination. *See Frontero v. Richardson*, 411 U.S. 677, 690 (1973). This Court should accept this writ to prevent the perpetuation of this error.

B. The Consent Decree Violates Title VII Because It Is Not Sufficiently Narrowly Drawn.

Failure of the settling parties to consider race-neutral alternatives appears not only to be violative of constitutional narrow tailoring requirements, but also of Title VII requirements that the race-conscious relief be narrowly drawn. While this Court has not been as explicit in requiring consideration of race-neutral alternatives in the Title VII setting as in the constitutional setting, it appears that such considerations have been considered a prerequisite under Title VII. Indeed, in *Local 28, Sheet Metal Workers v. EEOC*, *supra*, in discussing the reasons why the Court-ordered relief was sufficiently narrowly drawn, this Court noted that the record was replete with instances where lesser remedies had been tried, but failed. 478 U.S. at 476, 477.

The District of Columbia Court of Appeals has also addressed this issue specifically and found that "because available race-neutral

alternatives were not considered, the District's race-based hiring methods were not properly tailored to its remedial purposes .... Its use of the AAP thus stands condemned under Title VII for this reason as well." *Hammon v. Barry*, 826 F.2d 73, 81 (D.C. Cir. 1987). *See also Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981).

Indeed, since the precise harms flowing from the inappropriate use of racial preferences noted by this Court in the constitutional cases are present when this issue rises in the Title VII setting, the *Hammon* decision is undoubtedly correct. *See* Ruthieglen & Ortiz, *Affirmative Action Under the Constitition and Title VII: From Confusion to Convenience*, 35 U.C.L.A. L. Rev. 467 (1988); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But The Shouting*, 86 Mich. L. Rev. 524 (1987). *See also Johnson v. Transportation Agency, supra* at 648, 649, 650.

Nevertheless, Petitioners note that neither *Weber* nor *Johnson* expressly addressed the issue of whether the proponents of the respective plans considered race-neutral alternatives prior to adopting the plan at issue. To the extent that this issue has not been definitively decided under Title VII as it has for constitutional cases, this case presents an opportunity for the Court to decide this issue.[6]

Irrespective of whether race-neutral alternatives are to be considered prior to adoption of a plan, the Eleventh Circuit erred in holding that the consent decree at issue passed Title VII muster.

Under *Johnson v. Transportation Agency, supra*, to be sufficiently narrowly drawn, this decree had to be "a moderate, gradual, approach to eliminating the imbalance in its work force, one which establishes a realistic [and flexible] guide for [case-by-case] employment decisions, and which visits minimal intrusion upon the legitimate expectations of other employees." 480 U.S. at 640.

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[6] In *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1461, 1463 (O'Connor, J., concurring) Justice O'Connor suggests that the standards for affirmative action under Title VII and the Equal Protection Clause should be the same, at least in regard to public employers.

Among other failings, this decree is neither "realistic" nor "flexible." It is unrealistic because it provides no sensible guidance to the employer in determining who to promote. As noted, unlike *Johnson*, where the selection process was based upon test scores, expertise, background, and other relevant factors, the selection process here for the 240 set-aside positions is two-pronged. To be eligible for one of the set-aside positions, one must be black and one must have met minimal qualifications by sometime *after* 1984 and worked at WR-ALC for at least one day during the period from 1971-1979. Where a black has sufficient government (not WR-ALC) seniority and he or she was evaluated highly in 1983 (performance in the relevant 1971-1979 period was not considered), it is presumed that the class member was a victim of discrimination between 1971 and 1979 and entitled to a priority promotion. Neither the seniority component nor the appraisal component is a realistic measure of either exposure to allegedly discriminatory practices or qualification for promotion during the 1971-1979 period.

The decree also has no provisions that make it akin to the case-by-case approach required by *Johnson*. The plan in *Johnson* stressed that its percentages were goals, not set-asides, and should not be construed as quotas that must be met. The *Johnson* plan set forth reasonable aspirations aimed at correcting the statistical imbalances in the agency's workforce. *Johnson v. Transportation Agency*, *supra* at 635. Accordingly, the plan administrators and supervisors were to use sex as only one factor along with other criteria in making a promotion selection. Sex was nothing more than a plus in a particular applicant's file. The agency's plan required women to compete with all other qualified applicants, and no persons were automatically excluded from consideration. Unlike the subject decree, all persons, regardless of race or sex, were able to have their qualifications weighed against those of other applicants. Here, non-blacks are barred from even competing for the set-aside positions. For every other promotion within the target groups, blacks compete only against each other and non-blacks are excluded from consideration. There is no doubt but that the decree's untempered set-aside provisions fly in the face of the requirements of the case-by-case analysis required by *Johnson*.

It is apparent that the parties to the decree created a plan aimed at eliminating statistical workforce imbalances within a very limited number of job categories, and then established a racial set-aside which requires blind promotion by the numbers to achieve the desired racial mix in 38 job groups. That type of plan is condemned by *Johnson* and violates Title VII.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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August 31, 1989

Appendix A

Michael HOWARD, et al.,
Plaintiffs-Appellees,

v.

John L. McLUCAS, et al.,
Defendants-Appellees,

Robert Poss, et al.,
Intervenors-Appellants.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
et al., Plaintiffs-Appellees,

v.

John C. STETSON, etc.,
Defendant-Appellee,

Robert Poss, et al.,
Intervenors-Appellants.

No. 87-8817.

United States Court of Appeals,
Eleventh Circuit

April 27, 1989

Appeal from the United States District Court for the Middle District of Georgia.

Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

CLARK, Circuit Judge:

This is the second time this case has been before us. In *Howard v. McLucas*, 782 F.2d 956, 960-61 (11th Cir.1986) (*Howard III*), we held that white and nonminority employees (the intervenors) at the Warner Robins Air Logistics Center (Warner Robins) could intervene to challenge race-conscious promotional relief in a consent decree entered into by black employees (the plaintiffs) at Warner Robins

and the Secretary of the Air Force and others (the government). We admit that the issue presented in this appeal is problematic. While we decide the question of whether the promotional relief violates either Title VII of the Civil Rights Act of 1964 or the Fifth Amendment, we do so with the explicit recognition that the intervenors did not, on remand, present any evidence to the district court that the consent decree either had or would have an adverse impact upon any of their promotional expectations. Nonetheless, because this court specifically granted the intervenors the right to challenge the promotional remedy portion of the consent decree, we address the constitutionality of that relief. We agree with the district court, see *Howard v. McLucas*, 671 F.Supp. 756, 762-67 (M.D.Ga.1987) (*Howard IV*), that the promotional relief is not unlawful, and affirm its approval of the consent decree.

I. BACKGROUND

A. Facts

Warner Robins, which is part of the Air Force Logistics Command, is located at Robins Air Force Base near Macon, Georgia. It employs 15,000 civilians to manage logistics for assigned aircraft and commodities, repair aircraft and technologies, receive, store, issue, and transport spare parts and systems, and award annual contracts for Air Force procurement responsibilities. *Howard v. McLucas*, 597 F.Supp. 1504, 1508 (M.D.Ga.1984) (*Howard II*).

Warner Robins' blue collar employees are classified under the Wage Grade (WG) pay plan, which has fourteen grade levels.[1] Its white collar employees are classified under the General Schedule (GS) pay plan, which has sixteen grade levels. Under Warner Robins' internal promotion policy, employees in lower grades receive

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[1] Employees in WG 1-4 generally perform unskilled labor. Employees in WG 5 are helpers in skilled mechanical trades or full performance journeymen in other fields of work. Employees in WG 6 are ordinary journeymen outside the skilled mechanical trades. Employees in WG 7-8 are journeymen or have intermediate positions in skilled mechanical trades. Employees in WG 9-11 are journeymen in skilled mechanical trades. Record, Vol. 5, Tab 285 at 3.

the first opportunity to fill higher level positions. Except for job openings at GS 14 and above, all employees at Warner Robins are initially considered for all vacancies. *Id.* at 1508-09; Fairness Hearing, Record, Vol. 11 at 61 (testimony of Gary Carter, Civilian Personnel Officer at Warner Robins). Candidates for competitive promotions at Warner Robins are identified through the use of skills locator systems which, unlike announcement or posting systems, do not require employees to apply to fill an individual vacancy. The E426 system, which was used until 1978, generated promotion registers of all qualified candidates and ranked the candidates based on qualification requirements. Under the E426 system, primary factors such as experience, written examinations, and written appraisals were used to determine basic eligibility for a promotion, while secondary factors such as awards and self-development activities were used to determine the final ranking within a register and evaluate the top five candidates. The PPRS system, which replaced the E426 system, screens all employees for potential eligibility on the basis of such factors as pay, type of appointment, and basic skills from information entered into a computer through a comprehensive series of skills code. Employees who satisfy the test of basic eligibility are then subject to progression level ranking. The number of progression levels is determined by the type and grade of the position to be filled. Each progression level contains up to five factors identifying general and specific skills, knowledge, and characteristics. Advancement from one level to another occurs only when the requirements of the previous level have been satisfied. A series of tiebreakers—which include supervisory appraisals, awards, and seniority—are used to rank employees within a given level and generate promotion registers which usually last ninety days. *Id.*

Consonant with the operation of a skills locator system, employees at Warner Robins do not apply for promotions and are not notified that they have been considered for vacancies unless they are at the top of a register. The E246 and PPRS systems do not maintain records of employees who are initially considered for a specific promotion. The systems only generate records of candidates who are found to be qualified. *Id.* at 1509. Under both systems, only the most current supervisory appraisals are used, and as they are updated, the old appraisals are destroyed. There are therefore no existing supervisory appraisals for the 1971-1978 period. Record, Vol. 5, Tab 285 at

8. Because test scores are maintained only for current examinations and many examinations used by Warner Robins prior to 1979 have been discontinued, test score data for the 1971-1978 period is incomplete. *Id.*

B. Proceedings Leading to a Consent Decree

In 1975 the plaintiffs[2] filed an action against the government, seeking injunctive and monetary relief to redress alleged discriminatory employment practices at Warner Robins. Evidence garnered by the plaintiffs indicated that blacks "were concentrated in low level jobs and certain occupations." *Howard II*, 597 F.Supp. at 1513. In 1973, the average grade of white WG employees was 9.2, while the average grade of black WG employees was 6.7. In 1975, the average grade of white WG employees was 9.3, while the average grade of black WG employees was 6.8. *Id.* at 1510. Despite comprising approximately 15% of the workforce at Warner Robins, blacks constituted 86% of all janitors, 81% of all laborers, 76% of all packers, 76% of all motor vehicle operators, 71% of all woodcrafters, and 67% of all parts and equipment operators. Fairness Hearing, Record, Vol. II at 27.

Statistics compiled by the plaintiffs "demonstrated that black employees were promoted in proportions less than their representation in the workforce or in lower grades." *Howard II*, 597 F.Supp. at 1510. In 1973, 14.5% of minority employees received supervisory appraisals below 80, while only 6.2% of nonminority employees received such appraisals. In 1979, 38.3% of black employees received supervisory appraisals over 96, while 49% of white employees received such appraisals. Fairness Hearing, Record, Vol. II at 29-30. The plaintiffs' initial statistical analysis showed disparities in promotion rates out of grade in WG 1-4 (6.01 standard deviations—67.98 expected promotions lost), WG 5-8 (16.03 standard deviations—362 expected promotions lost), WG 9-12 (4.08 standard deviations—50.06 expected promotions lost), and GS 1-4 (3.56 standard deviations—72.67 pro-

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[2] The plaintiffs' class, which numbers approximately 3,200, consists of blacks who were employed at Warner Robins during the 1972-1979 period. *Howard III*, 782 F.2d at 958 & n. 2.

motions lost).[3] From this analysis the plaintiffs concluded that blacks at Warner Robins had lost a total of 553 promotions during the 1971-1979 period. *Howard II*, 597 F.Supp. at 1510. A more conservative analysis, controlling for occupational series, showed smaller disparities in promotion rates out of grade in WG 1-4 (3.53 standard deviations—36.68 expected promotions lost), WG 5-8 (8.19 standard deviations—162.84 expected promotions lost), and WG 9-12 (3.75 standard deviation—34.74 expected promotions lost). From this more conservative analysis, the plaintiffs concluded that blacks at Warner Robins had lost a total of 234 promotions during the 1971-1979 period. *Id.*

In 1984, after years of litigation, the parties entered into a consent decree, which was meant to ensure "that black employees were promoted internally [at Warner Robins] on a fair and equal basis." Consent Decree, Record, Vol. 4, Tab 256 at 5.[4] The decree awards $3.75 million in back pay to the plainfiffs and provides that 240 of the plaintiffs are to be promoted into 38 target positions (in WG 3-11) from special promotion registers made up only of qualified plaintiffs.[5] The special promotion registers are to be created by ranking plaintiffs who are qualified under Federal Civil Service standards and meet "basic eligibility requirements" by equally weighing seniority and supervisory appraisals. The 240 promotions alternate with general promotions so that every other promotion to the target posi-

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[3] Fluctuations of more than 2 or 3 standard deviations undercut the hypothesis that selections for promotions were being made randomly without regard to race. *See Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977).

[4] The consent decree provided that the government's settlement of the litigation did not constitute an admission of liability for past or present discrimination. Consent Decree, Record, Vol. 4, Tab 256 at 2.

[5] The figure of 240 promotions was determined by using positions in WG 2, WG 5-6, WG 8, and WG 10 as source grades. The 240 promotions were then apportioned across target positions to which blacks could be expected to be promoted, based on historical career progression patterns at Warner Robins, to determine the most likely jobs lost by blacks during 1971-1979 period. Once the jobs lost by blacks had been identified, the occupational series for those jobs were identified based on the projection of vacancies at Warner Robins in 1982 and 1983. Record, Vol. 5, Tab 285 at 16.

tions is from the special promotion registers. The decree limits the 240 race-conscious promotions at Warner Robins to the 38 target positions. *Id.* at 7-9 & Exhibit A.

C. The Challenge to the Consent Decree

The district court, after denying the intervenors leave to intervene, *see Howard v. McLucas*, 597 F.Supp. 1501, 1504 (M.D.Ga. 1984) (*Howard I*), approved the consent decree in *Howard II*. We reversed the district court's decision in *Howard I* and remanded the case to the district court, holding that the intervenors were entitled to intervene, but only in order to challenge certain portions of the consent decree:

> [The] [i]ntervenors are limited to challenging the portion of the remedy that reserves 240 target position promotional opportunities to [the plaintiffs]. They have no standing to contest the existence of past discrimination or any other issue concerning the merits of the dispute and no standing to contest the backpay award or veto remedial measures in general. The only issue [the] intervenors shall be permitted to raise on remand is their contention that [they] will not be considered for promotion to the 240 target positions on an equal basis with non-discriminatee black employees solely on account of race.

Howard III, 782 F.2d at 960-61. We also recognized that the intervenors failed to show any direct injury as a result of the promotional remedy. We nonetheless held that they should be heard on the issue: "If the implementation [of the promotional remedy] would have an adverse impact upon the promotional expectations of intervenors, they should be granted the opportunity to demonstrate that and should be heard in opposition to these provisions." *Id.* at 961 n. 5. Finally, we suggested that the district court determine whether the intervenors' claims, or any part thereof, had become moot because of the implementation of the decree's promotional relief. *Id.* at 961 n. 4.

On remand, the intervenors mounted a two-pronged attack on the promotional relief in the consent decree. First, they argued that there was no basis for the promotional relief because the plaintiffs

had not demonstrated any discrimination by the government and the government had not admitted any discrimination on its part. Second, they argued that even if discrimination had been shown, the promotional relief was unlawful.

Before addressing the intervenors' arguments, the district court held that the propriety of the promotional relief had been mooted to the extent that the targeted positions had been filled. According to the district court, by the time we issued our opinion in *Howard III*, 169 of the positions had been filled. *Howard IV*, 671 F.Supp. at 758. As to the intervenors' first contention, the district court, pointing to its previous findings of facts in *Howard II*, 597 F.Supp at 1509—10, held that the plaintiffs had "made out a *prima facie* case of employment discrimination through the use of statistical evidence of disproportionate racial impact." *Howard IV*, 671 F.Supp. at 760. The district court also held that for purposes of Title VII the fact that the government had entered into the decree without rebutting the plaintiffs' *prima facie* case amounted to an admission of unlawful discrimination. *Id.* at 761 (citing *Kirkland v. New York State Dept. of Correctional Servs.*, 711 F.2d 1117, 1130-31 (2d Cir.1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984)). As to the intervenors' second contention, the district court first held that the promotional relief was not unlawful because it provided a remedy to actual victims of discrimination: the consent decree utilized the best method of determining actual victims in light of the fact that the skills locator systems did not require any employees at Warner Robins to apply for promotions. *Id.* at 762-66. The district court then held that the promotional relief was narrowly tailored because it was directed only toward the grades where pervasive discrimination had been shown, was "ephemeral in nature," and was flexible in that the remedial promotions given to qualified plaintiffs were made to every other next available vacancy in the specified positions. The district court also found that the relief did not unnecessarily trammel the intervenors' rights because the 169 promotions which had already been given to qualified plaintiffs since the implementation of the decree constituted only 4.3% of the total number of promotions made

at Warner Robins during that period of time. *Id.* at 766-67.[6] Finally, the district court held that a mere racial preference would not provide the "full relief necessary to remove promptly the remaining vestiges of discrimination at Warner Robins." *Id.* at 767.

D. The Intervenors' Standing

Before commencing a discussion of the constitutionality of the promotional relief portion of the consent decree, we feel it incumbent upon us to address the confusion that the intervenors' challenge has engendered. Traditionally, a party seeking intervention must demonstrate a "direct, substantial, legally protectable interest in the proceeding" before that party will be granted intervenor status. *See, e.g., Athens Lumber Company, Inc. v. Federal Election Commission,* 690 F.2d 1364, 1366 (11th Cir.1982). The intervenors were not and have not been certified as a class. Thus, they should demonstrate some cognizable injury to themselves in order to challenge the consent decree.

As noted above, our earlier opinion granting the right to intervene recognized that the intervenors were not relieved of their burden of demonstrating that the promotional remedy would have an adverse impact on their promotional expectations. In addition, our earlier opinion specifically stated that the intervenors could only challenge the promotional relief on the basis that "[*they*]*will not be considered for promotion* to one of the 240 targeted positions on an equal basis . . . *solely* on account of race." *Howard III,* 782 F.2d at 961 (emphasis added). On remand to the district court, however, the intervenors presented no evidence of injury. The district court noted:

> As of July, 1984, there were 137 Intervenors identified by name. Defendants have presented evidence that of the 137 named Intervenors, forty-three (43) have subsequently been promoted . . . ; forty (40) are not eligible for promotion to any of the target positions; one (1) claimed

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[6] In discussing the impact of the promotional relief on white employees, the district court also noted that 43 of the 137 named intervenors had been promoted and that another 56 were not eligible for promotions to the target positions for one reason or another. *Howard IV,* 671 F.Supp. at 767 n. 4.

> eligibility for a position that she already held; five (5) subsequently requested changes to lower grades in other occupations, thereby indicating that they did not aspire to one of the target positions, and ten (10) are no longer employed by Warner Robins. Intervenors do not dispute these figures, rather, they merely assert that they are irrelevant so long as one Intervenor is eligible for a target position.

671 F.Supp. at 767 n. 4 (Record Cites omitted).

The intervenors' above argument to the district court is misplaced because they did not present *any evidence* that any one of them otherwise eligible for a target position was denied that position. Employment, in and of itself, does not confer the right to challenge an affirmative action plan. For example, in *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir.1987), an opinion that postdates our remand in this case, we held that claims that a consent decree resulted in reverse discrimination could not accrue until those seeking redress were denied promotions. *Id.* at 1498-99.

Although the intervenors in this case argue they have suffered injury because those among their ranks who received promotions necessarily received them later than they normally would have due to the structure of the promotional remedy, none of the intervenors have presented evidence on the issue. In addition, the intervenors' claim of delay is undercut in light of the fact that all those who have been promoted have received their promotions within a short time period resulting in a marginal effect on whites, if any. We recognize, however, that *a fortiori* some delay may have occurred. *See Howard IV*, 671 F.Supp. at 767. Therefore, despite the intervenors' tenuous position to contest the consent decree, we proceed to discuss the constitutionality of the promotional remedy in accordance with our previous opinion granting the intervenors leave to launch such a challenge.

II. THE MERITS

A. Standard of Review

In the past several years, the Supreme Court has had three opportunities to addess the constitutionality of race-conscious programs or orders.[7] *See United States v. Paradise*, 480 U.S. 149, 169-85, 107 S.Ct. 1053, 1066-74, 94 L.Ed.2d 203 (1987) (plurality opinion) (upholding temporary district court order requiring that equal number of blacks and whites be promoted to state trooper positions whenever promotions were required because order was necessary to ensure compliance with previous decrees and did not require gratuitous promotions); *Local 28 v. EEOC*, 478 U.S. 421, 475-79, 106 S.Ct. 3019, 3050-52, 92 L.Ed.2d 344 (1986) (plurality opinion) (upholding temporary district court order imposing nonwhite membership goal on union and its apprenticeship committee because order was necessary to combat the lingering effects of past discrimination, was not used to achieve and maintain racial balance, and had only a marginal effect on whites); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274-84, 106 S.Ct 1842, 1847-52, 90 L.Ed.2d 260 (1986) (plurality opinion) (striking down school board's policy of extending preferential protection against layoffs to minority employees because alternative means of remedying present effects of past discrimination, such as hiring goals, were available). Despite these recent opinions, the Supreme Court has yet to establish the standard by which to review equal protection challenges to governmental affirmative action programs. *See Paradise*, 107 S.Ct. at 1064. Some members of the Court believe that the remedial use of race is permissible only if it is justified by a compelling governmental interest and the means chosen to effectuate the government's purpose are narrowly tailored. *See*

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[7] Attempts by nonminority employees to challenge consent decrees which provide for race-conscious relief have engendered a good deal of academic commentary. *See, e.g.*, Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U.Chi. Legal F. 103; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887; Note, *Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decress with the Equal Protection Claims of Majority Employees*, 28 B.C.L.Rev. 1007 (1987).

Wygant, 106 S.Ct at 1846 (opinion of Powell, Rehnquist, Burger, and O'Connor, JJ.). Others contend that it is permissible if it serves important governmental objectives and is substantially related to the achievement of those objectives. *See Regents of University of California v. Bakke*, 438 U.S. 265, 359, 98 S.Ct 2733, 2783, 57 L.Ed.2d 750 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Justice O'Connor has observed, however, that

> the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards certain [governmental] interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one. The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a [government] actor is a sufficiently weighty [governmental] interest to warrant the remedial use of a carefully constructed affirmative action program.

Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).[8]

We need not delineate what standard of review should be employed, for we find that on this appeal the promotional relief in the consent decree "survives even strict scrutiny analysis: it is 'narrowly tailored' to serve a 'compelling governmental purpose.' " *Paradise*, 107 S.Ct. at 1064. Before addressing the merits, we emphasize that the intervenors bear the burden proving that the promotional relief is unconstitutional. *Wygant*, 106 S.Ct. at 1848.

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[8] The due process clause of the Fifth Amendment contains an equal protection component. *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). Although *Local 28*, *Wygant*, and *Paradise* involved state affirmative action programs challenged under the equal protection clause of the Fourteenth Amendment, they are fully applicable in this case because the equal protection guarantee of the Fifth Amendment is co-extensive with that of the Fourteenth Amendment. *Paradise*, 107 S.Ct. at 1064 n. 16.

B. Compelling/Important Interest

The consent decree in this case "must be considered equivalent to a voluntary affirmative action plan for purposes of equal protection analysis." *Birmingham Reverse Discrimination*, 833 F.2d at 1501 n.23 (11th Cir.1987). Before a public employer such as the government embarks on an affirmative action program, it must have "convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 106 S.Ct. at 1848. But a "contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Id.* at 1855 (O'Connor, J., concurring in part and concurring in the judgment), 1863 (Marshall, Brennan, and Blackmun, JJ., dissenting), 1867 (Stevens, J., dissenting). As Justice O'Connor has explained,

> [t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with [the Supreme] Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law." The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

Id. at 1855 (O'Connor, J., concurring in part and concurring in the judgment). Thus, when a pubic employer's affirmative action program or a consent decree providing race-conscious relief is challenged as unconstitutional, the district court "must make a factual determination that the [public] employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 1848. Once the public employer

> introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [public employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Id. at 1856 (O'Connor, J., concurring in part and concurring in the judgment).

Assuming that our limited remand allowed the intervenors to challenge the legal effect of the plaintiffs' statistical evidence, we hold that the government had a sufficient basis for concluding that remedial action was necessary. The district court's finding that the plaintiffs had established a *prima facie* case of discrimination, *Howard IV*, 671 F.Supp. at 760-61, was amply supported by the record. First, although blacks comprised 14% of the workforce at Warner Robins in 1973, when the plaintiffs' administrative charges were filed, they held only 3.3% of supervisory positions. Record, Vol. 5, Tab 285 at 9. Second, the average grade of white WG employees in 1973 and 1975 was two and half grades higher than that of black WG employees (9.2 to 6.7 and 9.3 to 6.8). *Howard IV*, 671 F.Supp. at 760. Third, in 1973 approximately 75% of black WG employees were in grades 1-8 compared to less than 33% of white WG employees. *Id.* Fourth, as of November of 1974, black WG employees spent more time in lower grade positions than did white WG employees and the average length of service for blacks in WG source positions was greater than the average length of services for whites in those same positions (e.g., the average length of service for blacks and whites in WG 5 was 8.4 years and 2.7 years respectively). Record, Vol. 5, Tab 285 at 11-12. Fifth, EEO documents and computer data demonstrated statistical disparities in the ranking factors (i.e., experience and training, supervisory appraisals, written examinations, and awards) used in both skills locators systems. *Id.* at 11; Fairness Hearing, Record,

Vol. 11 at 29-31. Sixth, conservative statistical studies for the 1971-1978 period indicated standard deviations of 3.53 to 8.19 in the promotion rates for blacks out of WG source grades. *Howard IV*, 671 F.Supp. at 761.

The intervenors argue that a showing of past discrimination must precede the implementation of the promotional relief and that this showing may be made only through the employer's own admittance of such discrimination or through a judicial finding of past discrimination. The intervenors argue that there was an insufficient predicate for the relief in this case because the consent decree contained a denial of liability and because *Birmingham Reverse Discrimination*, 833 F.2d at 1501 n. 22, forecloses the *prima facie* statistical showing from operating as a judicial finding of discrimination. We find their argument unpersuasive.

First, as noted above, *Wygant* demonstrates that an employer's denial of liability in the consent decree does not preclude approval of the decree. The government's denial of liability did not bind the district court which was required to examine the consent decree, ascertain whether it represented a reasonable factual and legal determination based on the record, and ensure that it did not violate federal law. *See United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir.1981) (Rubin, J., concurring); *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir.1977). *Wygant* also makes it clear that a judicial finding is not required before a public employer adopts an affirmative action program or enters into a consent decree that provides race-conscious relief.

Second, the footnote in *Birmingham Reverse Discrimination*, relied on by the intervenors, is inapposite and indeed irrelevant to the issue presented in this case. The footnote merely states that no judicial determination of discrimination had been made in that case, thereby distinguishing the affirmative action consent decree at issue in that case from court orders requiring affirmative action to remedy past discrimination. The footnote did not address the effect of a denial of liability in a consent decree nor did it state that a judicial determination of discrimination was a necessary component of a constitutional consent decree. We therefore hold that the government had a compelling and/or important interest in taking remedial action because it

had sufficient evidence to justify a conclusion that there had been prior discrimination against blacks at Warner Robins.

C. Narrowly Tailored

To satisfy strict scrutiny, the promotional relief in the consent decree must be narrowly tailored. As we previously explained, the promotional relief provides that 240 qualified plaintiffs, who were employed at Warner Robins during the 1971-1979 period and are listed in special promotion registers, are to be promoted into 38 target positions. The promotions from this list alternate with promotions from the general list so that every other promotion to the target positions is filled from the special promotion registers. In determining whether the promotional relief is appropriate, we must look to several factors.These factors include the "necessity for the relief and the efficacy of alternative remedies," the "flexibility and duration of the relief, including the availability of waiver provisions," the "relationship of numerical goals to the relevant labor market," and the "impact of the relief on the rights of [the intervenors]." *Paradise*, 107 S.Ct at 1067.

1. Necessity for particular relief.

The district court determined that the promotional relief was the only way of providing the "full relief necessary to remove promptly the remaining vestiges of discrimination at Warner Robins," especially in light of the decade-long delay in the case, and noted that it had not been presented with any other less intrusive approach that might provide full relief to the plaintiffs within a reasonable time. *Howard IV*, 671 F.Supp. at 767. To evaluate the district court's determination that the promotional relief was necessary, "we must examine the purposes the [relief] was intended to serve." *Paradise*, 107 S.Ct at 1067. The consent decree was entered into to ensure the expeditious equal promotion of blacks at Warner Robins and remedy the effects of years of discrimination. The district court found that "discrimination in [the WG] source positions was pervasive throughout the entire period [in question]," and noted that the promotional relief was directed only to the wage grades where discrimination had occurred. *Howard IV*, 671 F.Supp. at 763. *Cf. Paradise*, 107 S.Ct. at 1067-70 (order requiring promotion of equal number of blacks and whites to

state trooper positions in Alabama Department of Public Safety was necessary to eliminate the effects of the Department's previous discrimination, to ensure expeditious compliance with previous decrees pertaining to that discrimination, and to eliminate the possible effects of the Department's delay in developing a procedure without adverse impact on blacks).

The intervenors contend that the theory behind the number of promotions which are reserved for qualified plaintiffs is wrong because the 6.5% attrition rate at Warner Robins indicates that only 122 of the 240 plaintiffs who were discriminated against on the median date of January 1, 1975 remain in the workforce. Brief for Intervenors at 42-43 & n. 18. We dismiss this argument as improperly raised. Our remand limited the issues that the intervenors could raise and specifically denied them standing to challenge the existence of past discrimination or any other issue concerning the merits of the dispute. *Howard III*, 782 F.2d at 960-61.

The intervenors also argue that the promotional relief was unnecessary because other remedial alternatives were available. According to the intervenors, the relief could have been spread out over a longer period of time and double promotions (i.e., promoting off both the regular register and the special promotion register) could have been used. These alternatives, however, are not feasible because they do not place the plaintiffs in their rightful place or do not do so as expeditiously.[9] The district court, which has been involved with the litigation between the government and the plaintiffs since its inception in 1975, did not err in finding that the promotional relief was necessary. The government's efforts to eliminate the effects of past discrimination would have been thwarted unless 240 qualified plaintiffs were promoted to the 38 target positions.

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[9] The intervenors' argument that the promotional relief should have been tempered by red-circling of pay rates or seniority for white employees who would have been promoted but for the 240 promotions, Brief for Intervenors at 44, is unpersuasive. Those employees, like all others at Warner Robins, do not have a legitimate expectation of being promoted, *Howard IV*, 671 F.Supp. at 766 n. 3, and, as we indicated earlier, there is no evidence that any given intervenor would have received a promotion but for the promotional relief.

2. Flexibility of relief.

The flexibility and short duration of the promotional relief cannot seriously be called into question. First, the relief does not prevent white employees from being promoted to the affected wage grades because promotions to qualified plaintiffs alternate with general promotions so that every other promotion to a targeted position is from the special promotion registers. White employees are at most delayed in receiving a promotion to a limited number of specified positions. Second, to be promoted under the terms of the consent decree, the plaintiffs must meet certain qualification criteria. To be included on the special list the class member had to (1) "first meet the normal, basic eligibility requirements for the position sought; (2) the class member must have higher supervisory ratings in late 1984 than other blacks evaluated by the same supervisor; and (3) the seniority of the employee as determined by his service computation date must be considered." *Howard IV*, 671 F.Supp. at 763 (Record Cites omitted). Third, the government is not required to make a promotion unless one is necessary. Fourth, the relief is not meant to set employment percentage goals or ensure a racially balanced workforce, and it evaporates when the 240 promotions are made. *Howard IV*, 671 F.Supp. at 766-67. Simply put, the promotional relief does not constitute blind hiring by the numbers and does not amount to a rigid and impermissible quota system. *See Paradise*, 107 S.Ct. at 1070-71 (order requiring promotion of equal number of blacks and whites was flexible and temporary because it could be waived if there were no qualified blacks, and no gratuitous promotions had to be made).

3. Numerical goals.

The relationship of the numerical goal of the promotional relief to the percentage of blacks in the labor force is not a relevant factor in this case. The 240 special promotions do not represent or achieve any aggregate proportionality. Once the 240 promotions are made, the promotional relief ceases, regardless of the percentage of blacks or whites in higher wage grades.

4. Impact of the relief.

We agree with the district court that the impact of the promotional relief on the intervenors is "relatively diffuse." *Howard IV*, 671 F.Supp. at 767. To begin with, the relief does not have the drastic impact of layoff requirements found constitutionally impermissible in *Wygant*, and it does not impose a bar to the intervenors' advancement. *See Paradise*, 107 S.Ct at 1073; *Local 28*, 106 S.Ct. at 3052-53. While the relief may delay the promotions of certain intervenors (those who are actually promoted) to the target positions, it does so only for a limited time. Moreover, "[a]lthough some white [employees] will have their promotions delayed, it is uncertain whether any individual [employee], white or black, would have achieved a different [grade], or would have achieved it at a different time, but for the promotion requirement." *Paradise*, 107 S.Ct. at 1076 (Powell, J., concurring).

Furthermore, the intervenors and other white employees who are delayed in possible promotions to the target positions are still eligible for other promotions. The 169 promotions that were made from December of 1984 to October of 1986 comprised only 4.3% of the promotions made at Warner Robins during that period of time. *Howard IV*, 671 F.Supp. at 767. *See also Howard II*, 597 F.Supp. at 1503 (special promotions are expected to constitute only 6.5% of all promotions made during period of implementation of the consent decree). The diffused impact of the promotional relief on the intervenors is further highlighted by the fact that 56 of the 137 named intervenors are not eligible or otherwise unable to be promoted to the target positions and that of the remaining 83 intervenors, 43 have been promoted. *Howard IV*, 671 F.Supp. at 767 n. 4.

The intervenors assert that the promotional relief is not diffuse because it applies only to 38 target positions at Warner Robins and therefore burdens a small segment of the workforce. Brief for Intervenors at 43. We disagree. As the government pointed out in the district court, over 8,000 whites are qualified for promotions to the target positions. Government's Memorandum in Opposition to Intervenors' Motion to Vacate Promotional Provisions of Consent Decree, Record, Vol. 7, Tab 323 at 25. *See* Workforce Statistics Exhibit, Index #275 at E2-3 (indicating the number and percentage of black and nonblack employees qualified for promotions to each of the 38 target

positions). The burden imposed by the promotional relief does not fall upon a narrow segment of the workforce. Putting aside the numbers we have just mentioned, the intervenors' argument proves too much. If the promotional relief extended to all positions at Warner Robins, thereby satisfying the intervenors' concerns, it would be criticized on the ground that it was not narrowly tailored because it was not limited to those positions in which the plaintiffs had been denied promotions. Given the difficulties inherent in fashioning a proper remedy in this case, the promotion relief strikes the proper balance.

5. Actual victims.

The intervenors argue that the best procedures were not used to determine which black employees were discriminatorily denied promotions. As we noted in part I. A., due to the nature of Warner Robins' promotion system, there are no records that would permit such identification. It would also have been futile to inquire which of the plaintiffs applied for promotions, since all employees at Warner Robins are initially considered for all vacancies without having to apply for them. The district court's finding that the best method of determining the actual victims of discrimination at Warner Robins was utilized in the consent decree, *Howard IV*, 671 F.Supp. at 763, is not clearly erroneous. *See Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 479 F.Supp. 101, 115-16 (D.Conn.1979) (affirmative action program for nonvictims would be devised if identification process could not identify enough actual victims of discrimination to fill 102 positions which had been set aside), *aff'd in part and vacated in part on other grounds*, 647 F.2d 256 (2d Cir.1981), *cert. denied*, 455 U.S. 988, 102 S.Ct. 1611, 71 L.Ed.2d 847 (1982). *Cf. Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir.1974) (individualized hearings to determine which employees were actual victims of discrimination entitled to award of back pay are not required when "the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices . . . calls forth the quagmire of hypothetical judgment"). Our conclusion that the promotional relief is narrowly tailored is buttressed by the intervenors' failure to show that any of the plaintiffs were not discriminated against.

III. TITLE VII CLAIM

The Supreme Court has held that Title VII's limits on a public employer's adoption of affirmative programs or race-conscious relief embodied in consent decrees do not extend as far as those of the Constitution. *See Johnson v. Transportation Agency*, 480 U.S. 616, 627 n. 6, 107 S.Ct. 1442, 1449 n. 6, 94 L.Ed.2d 615 (1987); *Steelworkers of America v. Weber*, 443 U.S. 193, 206 n. 6, 99 S.Ct. 2721, 2729 n. 6, 61 L.Ed.2d 480 (1979). Our determination that the promotional relief does not violate the Fifth Amendment therefore means that it satisfies § 703 of Title VII, 42 U.S.C. § 2000e-2(a), which makes it unlawful for employers to discriminate on the basis of race, color, religion, sex, or national origin but does not completely prohibit all affirmative action programs. *See Weber*, 443 U.S. at 208, 99 S.Ct. at 2729.[10]

IV. CONCLUSION

We acknowledge that the two legal grounds upon which we base our opinion may be considered dicta. The intervenors' argument that the plaintiffs' showing of past discrimination was insufficient to overcome the intervenors' Fifth Amendment rights was arguably foreclosed by our opinion in *Howard III*. To foreclose that argument, we have answered it.

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[10] Because a consent decree is not an "order" within the enforcement provisions of Title VII, it cannot be challenged on the ground that it violates § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) which prohibits a court from entering an order requiring an employer to give relief to an employee who suffers adverse job action if the action was taken for any reason other than discrimination on account of race, color, religion, sex, or national origin. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 521-24, 106 S.Ct. 3063, 3075-77, 92 L.Ed.2d 405 (1996). Even § 706(g), however, permits, in certain circumstances, remedies which are not limited to actual victims of discrimination. *Local 28*, 106 S.Ct. at 3047-49 (plurality opinion), 3054 (Powell, J., concurring).

The remand in *Howard III* as we interpret it gave intervenors the opportunity to prove that implementation of the decree would have an adverse impact on them and if so intervenors could attack the remedial provisions awarded to plaintiffs. Although intervenors failed to show any adverse impact, we nevertheless approve the promotional remedy based on the record in the case and the district court findings.[11]

AFFIRMED.

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[11] Given our decision, we need not address whether the intervenors' challenge to the promotional relief was rendered moot to the extent that 169 plaintiffs had already been promoted by the time we rendered our opinion in *Howard III*.

Appendix B

IN THE UNITED STATES COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MICHAEL HOWARD, et al., Plaintiffs,	)	
	)	CIVIL ACTION
	)	75-168-MAC (WDO)
vs.	)	
JOHN L. McLUCAS, et al., Defendants.	)	

OWENS, Chief Judge:

The court's duty at this moment is clear. It must once and for all put to rest the question of whether the proposed consent decree submitted in this case by the plaintiffs and defendants is a fair, adequate, reasonable, and lawful resolution of this class action controversy. This court's previous determination that the consent decree was, in fact, a fair, adequate, reasonable, and lawful resolution of this case has been set aside in part by the decision of the Eleventh Circuit Court of Appeals in *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986). That decision, however, was not a finding by the Circuit Court that the decree in question was unreasonable or unlawful. The Circuit Court merely required that before this court could grant final approval to the consent decree, Intervenors, white and non-black minority employees at Warner Robins Air Logistics Center ("Warner Robins"), must be allowed to intervene so that they may have an opportunity to challenge the relief provided by the consent decree. In allowing the intervention, however, the Circuit Court limited Intervenors' challenge of the proposed consent decree solely to that portion of the decree that reserves 240 target position promotional opportunities to class members. *Id.* at 960. Intervenors have no standing to contest the backpay award or other remedial measures pro-

vided for in the consent decree. *Id.* at 960-61. Because of this limitation, the court's previous determinations with regard to the appropriateness of the non-promotional relief provided for in the consent decree are hereby readopted and made a part of this order for the reasons stated in the court's order dated November 20, 1984. The court next turns the issue of the adequacy and legality of the promotional relief.

Appropriateness of the Promotional Relief

Before discussing the legal issues raised by the granting of promotional relief, it is important to point out the additional limitations imposed on Intervenors by the Eleventh Circuit that they must face in disputing the appropriateness of the promotional relief. First, the Eleventh Circuit's decision makes clear that Intervenors may not contest "the existence of past discrimination or any other issue concerning the merits of the dispute" between plaintiffs and defendants. *Id.* at 961. The second, and perhaps most important limitation, is the fact that the Eleventh Circuit refused to stay the implementation of the consent decree. By the time the Circuit court issued its decision, 169 target positions had been filled by members of the plaintiff class. To the extent that the targeted promotional positions have been filled, the issue of whether the promotional relief is appropriate has been mooted. *Id.* at 961 n.4. With these limitations thus stated, the court must now proceed to the merits of Intervenors challenge.

The court begins its analysis by recognizing that voluntary settlement of Title VII employment discrimination suits is preferred by both Congress and the judiciary. *See Dent v. St. Louis San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir.), *cert. denied*, 403 U.S. 912 (1969). In fact, voluntary compromises of Title VII actions enjoy a presumption of validity, and should be approved "unless ... [they] contain[ ] provisions that are unreasonable, unlawful or against public policy." *See Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1128-29 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 997 (1984); *United States v. City of Alexandria*, 614 F.2d 1358, 1359, 1362 (5th Cir. 1980); *Vulcan Society of New York City Fire Department, Inc. v. City of New York*, 96 F.R.D. 626, 629 (S.D. N.Y. 1983); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983); and *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*). Where a consent decree is to be utilized, how-

ever, the district court has a duty to become more involved in the actual settlement process than it would in the ordinary case. In the case at bar, the court has striven to fulfill that duty. The evidence on this point is that the court has been completely involved in the pretrial proceedings. There have also been numerous pretrial conferences. Further, the court held an evidentiary fairness hearing on August 9, 1984, at which comments and objections by both class members (black employees at Warner Robins) and non-class members (white employees at Warner Robins, organized as the "Warner Robins Constitutional Rights Fund") were voiced. The court also heard at that hearing plaintiffs' contentions with regard to the evidence in the case, plaintiffs' reasons why the relief sought was necessary, and plaintiffs' justification of the methodology used to develop the plan for relief. This court is, therefore, fully cognizant of the facts and circumstances surrounding the case, and is now in a position to pass judgment on the proposed consent decree.

Because the decree will reach into the future and will have a continuing effect, the court must not only determine whether the settlement is fair, adequate, and reasonable, *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977), it must further examine the decree carefully to ascertain whether

> it does not put the court's sanction on and power behind a decree that violates Constitution, statute or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of the record, whether established by evidence, affidavit, or stipulation.

See City of Miami, 664 F.2d at 441. Where, as in this case, it is alleged that the rights of third parties, such as Intervenors, will be affected by the implementation of the decree, the court must carefully scrutinize the consent decree with respect to these alleged rights. If the court should conclude that the effect on the third parties is "neither unreasonable nor proscribed," it should be approved. *Id.* Furthermore, in determining whether a Title VII class action settlement agreement should be approved, courts should consider the probability of plaintiffs' success on the merits and the range of possible relief available given that success. *See Kirkland*, 711 F.2d at 1129; *Reed v.*

General Motors Corporation, 703 F.2d 170, 172 (5th Cir. 1983); *Plummer v. Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14; *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 455 (2d Cir. 1974). *See generally* 7B C. Wright & A. Miller, *Federal Practice and Procedure* § 1797.1, at 378-416 (1986). A review of these decisions leads the court to believe that approval of the consent decree rests upon the resolution of two central inquiries: (1) whether there exists a condition that can serve as a basis for the creation of the promotional relief; and (2) whether the specific remedies of the compromise agreement are neither unreasonable nor unlawful. Intervenors' objections fall within the parameter of these inquiries, and can be summarized as follows: (1) that there is no basis for the creation of promotional relief because plaintiffs have not demonstrated any discrimination on the part of defendant, nor has any discrimination been admitted by defendant, and (2) even assuming that discrimination has been shown, the terms of the promotional relief are unreasonable and unlawful.

A. The Basis for the Promotional Relief

Despite the Eleventh Circuit's clear mandate that Intervenors would not be allowed to contest the findings of discrimination in this case, they continually argue in their briefs before the court that plaintiffs have made no showing of discrimination that might justify the relief provided for in the consent decree. While not required to address this finding, the court recognizes that the question of whether discrimination has been shown is critical to the issue of whether the promotional relief in this case is warranted. So in order to clarify this point, the court will elaborate on why a finding of discrimination is warranted in this case.

Before relief can be provided victims of discrimination, there obviously must be a finding of actual discrimination. The question is, however, whether that finding must be based on a formal finding by the trier of fact following a full trial, or whether something less is required. The case law on this subject clearly supports the latter approach. In fact, neither Title VII nor the Constitution prohibits compromise agreements implementing race-conscious remedies which are agreed to prior to a judicial determination on the merits. *See United Steelworkers of America v. Weber*, 443 U.S. 193, 207-08 (1979); and *Regents*

of University of California v. Bakke, 438 U.S. 265, 301-03 n.41. The parties must merely show that the relief provided is based upon some well substantiated claim of racial discrimination against the plaintiff class. *See Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981); and *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981). Plaintiffs have made such a showing.

This court has previously found that plaintiffs have made out a *prima facie* case of employment discrimination through the use of statistical evidence of disproportionate racial impact. In its previous order the court made the following findings of fact:

Statistical evidence

13. In 1973, blacks comprised 14% of the workforce at Warner Robins; in 1976 blacks comprised 15.3% of the workforce; and in 1978 blacks comprised 16.6% of the workforce.

14. In 1973, 65.2% of black GS employees were in GS 1-4 positions and 76.3% of black WG employees were in WG 1-8 positions. For that same year, 18.6% of white GS employees were in GS 1-4 positions and 31.2% of white WG employees were in WG 1-8 positions. In 1973, 85.7% of black employees held jobs in WL 2-8 and 85.8% of blacks held supervisory jobs in WS 1-8. In that same year 2.5% of white employees held jobs in WL 2-8 and 25.9% of whites held supervisory jobs in WL 1-8.

15. The average grades of all employees in 1973 and 1975, respectively, were as follows:

Average Grades of White and Black Employees, 1973

Pay Plan	All Employees	White Employees	Black Employees
GS	7.8	8.0	4.5
WG	8.7	9.2	6.7
WS	9.7	10.0	6.6

Average Grades of White and Black Employees, 1975

Pay Plan	All Employees	White Employees	Black Employees
GS	7.8	8.0	4.6
WG	8.6	9.3	6.8
WL	9.6	9.9	5.0
WS	9.9	10.1	6.9

16. The number of supervisors by race in the workforce from 1968 through 1974 was as follows:

Year	Total Supervisors	White Supervisors	Minority Supervisors
1968	1,605	1,605	45
1969	1,937	1,890	47
1970	1,927	1,927	45
1972	1,614	1,560	54
1973	1,327	1,327	45
1974	1,338	1,289	49

17. Plaintiffs' statistics demonstrated that black employees were promoted to upper level jobs in proportions less than their representation in the workforce or in lower grades.

18. Plaintiffs' statistical analysis of the computer files for the period 1971 through 1978 showed statistical disparities in promotion rates out of grade in WG grade groupings 1-4, 5-8, and 9-12, and GS grade grouping 1-4, that plaintiffs' expert found to be statistically significant. From these statistics plaintiffs concluded that a total of 553 jobs had been lost to blacks.

Grade Group	No. of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	6.01	67.98
WG 5-8	16.03	362.00
WG 9-12	4.80	50.06
GS 1-4	3.56	72.67

Id. (Fluctuations of more than 2 or 3 standard deviations undercut the hypothesis that selections for promotions were being made randomly with respect to race.) *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498 (1977); *Hazelwood School District v. United States*, 433 U.S. 299, 311, 97 S.Ct. 2736, 2743, 53 L.Ed.2d 768 (1977).

19. Plaintiffs' more conservative analysis, controlling for occupational series, showed statistical disparities in the same WG grade groupings that plaintiffs found to be statistically significant, but no statistically significant disparities in any GS grade grouping. From this analysis, plaintiffs concluded that a total of 234 jobs had been lost to blacks.

Grade Group	No. of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	3.53	36.68
WG 5-8	8.19	162.84
WG 9-12	3.75	34.74

See Howard v. McLucas, 597 F.Supp. at 1509-10. These findings are not subject to attack by Intervenors since the Eleventh Circuit has affirmatively held that they do not have standing to contest findings relating to "past discrimination or any other issue concerning the merits of the dispute" between plaintiffs and defendants. *Howard v. McLucas*, 782 F.2d at 960-61. The accuracy of these statistics not being subject to attack, Intervenors are left only with the argument that these unchallenged statistical studies are insufficient as a matter of law to make out a prima facie case of discrimination. The Second Circuit in *Kirkland* addressed this argument and found that, contrary to Intervenors' assertion, where a defendant enters into a compromise without rebutting an established *prima facie* case, the fact that he enters into a compromise amounts to an admission of unlawful discrimination for purposes of Title VII. *See Kirkland*, 711 F.2d at 1130-31 (and cases cited therein). This is because a statistical showing of adverse impact creates a presumption of Title VII discrimination, which, if not rebutted by any showing that the contested practice was job-related, requires the court to enter a decree finding unlawful discrimination. *Id.* The court in *Kirkland* also correctly pointed

out that the mere fact that the settlement agreement contains disclaimers of any admission of unlawful discrimination does not alter that conclusion, rather, such disclaimers should be construed as an admission of a statistical disparity together with a reservation of the right to explain it in the future. *Id.* at 1131 n.16. Given this conclusion, it is clear that plaintiffs have shown discrimination on the part of defendant, and, therefore, have demonstrated a basis upon which relief should be granted.

The recent Supreme Court cases dealing with race-conscious affirmative action plans do not alter this conclusion. For example, in *Johnson v. Transportation Agency, Santa Clara County*, 94 L.E.2d 615 (1987), the Supreme Court held that before an affirmative action plan may be utilized, an employer must find a "manifest imbalance" in a traditionally segregated job category. *Id.* at 630-31. This "manifest imbalance," however, need not be such that it would support a *prima facie* case against the employer. *Id.* at 631. Since this court has already found that plaintiffs have made out a case of *prima facie* discrimination, clearly then, this requirement for race-conscious relief has been met.

In *United States v. Paradise*, 94 L.Ed.2d 203 (1987), the Supreme Court further held that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *Id.* at 220. This is because the government unquestionably has a compelling interest in remedying past and present discrimination by a state actor. *Id.* at 220. Where, as in this case, discrimination has been demonstrated by plaintiffs, the district court is given broad powers to remedy the effects of that discrimination. Clearly then, race-conscious relief of some sort is permissible to remedy the past discrimination shown by the evidence in this case and the use of such relief is not a *per se* violation of either Title VII or the Equal Protection Clause. The court, however, recognizes that any relief it authorizes must be narrowly drawn to achieve the goal of remedying the effect of that past discrimination.

B. The Terms of the Promotional Relief

The terms of the 240 target position promotional opportunities set aside for class members has been delineated as follows:

> The Consent Decree provides promotional relief to black employees who meet basic eligibility standards for promotion to certain GS, WG, WL, and WS positions, such that Warner Robins will fill 240 specified permanent positions through internal merit promotion processes from among qualified class members. Promotions will be made to every other next available vacancy in the specified positions until the 240 specified positions have been filled.
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> 26. Nothing in the settlement requires Warner Robins to promote or otherwise place any person into a position for which that person is not at least minimally qualified under appropriate Federal Civil Service rules, regulations, and qualifications standards. "Normal basic eligibility requirements" are as defined by the Office of Personnel Management in Handbook X-118 or X-118C.
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> Only class members hired before January 1, 1980, will be eligible for the above promotional relief.

Howard v. McLucas, 597 F.Supp. at 1511 (footnote omitted). In this case, these 240 positions set aside for class members represent, to the best extent possible, the most likely jobs lost to blacks from 1970 through 1979 as a result of the discrimination at Warner Robins. The total number of promotions awarded was derived from the statistical evidence developed in this case by the parties. *See* Proposed Order Granting Final Approval to the Consent Decree, ¶¶ 36-41. The 240 promotional positions set aside are, in fact, a conservative calculation of the actual promotions, as demonstrated by the evidence of record, lost by blacks in the various wage grades at Warner Robins. In addition, the consent decree makes an attempt, to the best extent possible, to fill these positions with personnel that have been identified as actual victims of defendants' discrimination.

To the extent that the promotional relief is targeted to providing a remedy to an actual victim of discrimination, Intervenors' claims that the relief is either unreasonable or unlawful must fail. There is no question that section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), authorizes relief to victims of an employer's discrimination. Normally, where an employee has been denied a promotion, the remedy will ordinarily include not only back pay, but also an injunction to assure that the one who was unlawfully denied a promotion be given the position improperly denied her. Such an injunction has the effect of giving the victims of discrimination an absolute preference over whites or other non-discriminatee minorities who may subsequently seek the position. *See Ivey v. Western Electric Co.*, 23 Fair Empl. Prac. Cas. (BNA) 1028, 1033-34 (N.D. Ga. 1978) (victims identified under claims procedure to be placed on "Priority Promotion List" and be given "the first vacancies available in the affected job categories"); *Hill v. Western Electric Co.*, 13 Fair Empl. Prac. Cas. (BNA) 1157, 1162-64 (E.D. Va. 1976) (victims identified by special master to be given "priority offers of promotion, transfer, and hiring"), *aff'd in part and rev'd in part*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *Stamps v. Detroit Edison Co.*, 365 F.Supp. 87, 121 (E.D. Mich. 1973) (victims to receive "first opportunity to apply for vacancies"; procedure for identifying victims unclear), *rev'd sub nom. EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); *Vogler v. McCarty, Inc.*, 2 Fair Empl. Prac. Cas. (BNA) 491, 494, 497 (E.D. La. 1970) (44 named blacks to be admitted to union and "given priority as to initial referral as employees"), *aff'd*, 451 F.2d 1236 (5th Cir. 1971); *United States v. Medical Society of South Carolina*, 298 F.Supp. 145-56 (D.S.C. 1969) (four named blacks to be "given preference over all other applicants for the next four vacancies"). Intervenors contend, however, that no victims have ever been identified in this case, and, in fact, no discrimination has ever been proven. The court has already explained that discrimination has been proven in this case, and, therefore, need not discuss that issue further. With respect to the identification of specific victims of defendants' conduct, due to the nature of the promotional system at Warner Robins, it is impossible to identify with surgical precision the specific blacks affected by that system. Nevertheless, the Supreme Court has never required such precision, and has acknowl-

edged that "the process of recreating the past will necessarily involve a degree of approximation and imprecision." *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977). As already pointed out, the positions set aside represent the most likely jobs lost by blacks from 1971 through 1979. In addition, plaintiffs and defendants have attempted to place the most likely victims of discrimination in these positions by establishing certain criteria to determine who will receive one of the 240 promotions. In order to accomplish this task, special promotion registers were compiled to implement the relief. These registers were created by applying a three part test: (1) the class member must first meet the normal, basic eligibility requirements for the position sought (Consent Decree, ¶ 12(b)(1)); (2) the class member must have higher supervisory ratings in late 1984 than other blacks evaluated by the same supervisor, *id.*; and (3) the seniority of the employee as determined by his service computation date must be considered. *Id. See also* Proposed Order Granting Final Approval to the Consent Decree, ¶ 36-41 which details methodology used to identify jobs lost to blacks. By using these factors, the most presently qualified class member is thus eligible for one of the special promotions, and, assuming that this same person has performed similarly in the past, he/she is more than likely an actual victim of defendants' discriminatory conduct. A more specific way of identifying these actual victims does not exist in this case.

Both plaintiffs and defendants agree that due to the promotional system in place during the relevant time period, sufficient records were not maintained to identify class members that were excluded from consideration for promotion unfairly. Only the names of candidates found to be qualified for promotion were maintained. *Howard v. McLucas*, 587 F.Supp. 1508-09. Furthermore, the promotional system at Warner Robins required no individual to formally apply for a position since all employees were considered for each promotion. Plaintiff class members, therefore, cannot even testify that they applied for a promotion but were turned down. Based upon these facts, the court finds that the best method of determining the actual victims of defendants' discrimination has been utilized in the consent decree.

Intervenors point to certain alleged deficiencies in the statistics used to develop the promotional registers. First, they contend that

the service computation date (SCD), which is used to determine seniority, does not accurately indicate in all cases an employee's true length of service. While it is true that the SCD does not literally define the length of employment at Warner Robins, this method has been approved by the Air Force as the designated seniority measure for ranking purposes in the regular merit promotion system. *See* Defendants' Pre-Trial Proposed Findings of Fact and Conclusions of Law, ¶ 54. In addition, the evidence indicates that employees with the earliest SCD's are more likely to have been employed the longest at Warner Robins. Supp. Wooley Aff., ¶ 7. Given these facts, the court is not convinced that the method used to determine seniority is so unreliable as to warrant the use of an alternative method.

Second, Intervenors contend that the victim identification procedure fails to consider the length of time a class member was in a source position, and, further, that it fails to determine whether that class member was ever in a source position during the relevant time period. As a result of this, Intervenors argue that those employees who have been in a source position throughout all or most of the relevant period will not be treated fairly when determining their seniority ranking. With respect to the contention that an employee, during the relevant time period, may not have ever been in one of the affected source postitions wherein pervasive discrimination has been found, the court finds that the consent decree, to the best extent possible, has attempted to identify and promote only those class members who were most likely passed over for promotion into one of these source positions during the relevant period. This result has been achieved by way of a two-fold process: (1) the special promotional relief is limited to only those black employees who were in an appropriated fund career or career-conditional position for any time during the period of March 24, 1972, through December 31, 1979; and (2) the class member must also demonstrate the basic eligibility, seniority, and supervisory criteria, as described *supra*, p. 14, before he can be promoted into one of these positions. This process, therefore, considers only employees of Warner Robins that were employed during the relevant period wherein the court found evidence of discrimination. Further, by presently meeting the basic eligibility requirements for one of the special promotions, and by requiring the most senior and best rated class member be promoted first, as determined by the

supervisory and SCD ratings, it becomes likely that this same employee has been eligible for that same promotion for a considerable period of time; that this period of time likely extends back into the period during which discrimination has been demonstrated; and that, therefore, he/she is a likely victim of discrimination entitled to relief. Accordingly, the court finds that given the unavailability of any government documents that show which class members were passed over for promotion during the relevant time period, the method of identification utilized in the consent decree is the best alternative identification system available.

As to Intervenors objection that the consent decree does not take into account the length of time a class member was exposed to defendants' discrimination, the court sees no reason why the length of discrimination should be a factor in determining seniority ranking for class members. Discrimination in these source positions was pervasive throughout the entire period. Even if the class member was exposed to this discrimination for only a short while, discrimination of a short-term nature is equally redressable as that of a long-term nature. While the court recognizes that theoretically, at least, a lesser aggrieved class member may be afforded relief over a more aggrieved class member under the present identification process, both class members are entitled to relief. Intervenors simply do not have standing to object to this unavoidable shortfall in the identification process. Further, where the promotional process in place at Warner Robins during the relevant time period offers little help in determining who the actual victims of discrimination are, it is not unreasonable for class members to settle on a promotional relief scheme that potentially may result in incidents of more serious discrimination being overlooked in favor of less egregious, but equally serious under the law, incidents of discrimination being remedied.

Thirdly, Intervenors contend that the seniority ranking system fails to take into account special circumstances such as leaves of absence taken by employees. Intervenors' Brief, p. 30. The court is simply not persuaded that the failure to take into account these circumstances will render the seniority ranking system unfair or unduly inaccurate. The evidence is clear that only class members employed during the relevant period have become eligible for one of the special promo-

tions. Furthermore, plaintiffs' statistics have demonstrated consistent disparities throughout the 1971 to 1979 period, and, therefore, a class member employed during any of that period, who also meets the other identification criteria, is more than likely a victim of defendants' discrimination. Accordingly, the court finds the victim identification process utilized in the consent decree to be a reliable and narrowly tailored process designed to assure that only victims of discrimination be afforded relief. This conclusion is not changed by Intervenors' "random case history analysis." Intervenors have failed to show that any of these class members were not victims of defendants' discrimination. All were at Warner Robins for at least a portion of the 1972-1979 period, and all were qualified for the promotions they received. To the extent that a lesser qualified victim was promoted before a more qualified victim, Intervenors simply do not have standing to object since, as already stated, *all* victims of discrimination are entitled to full relief from this court.

Finally, Intervenors assert that the government has wilfully destroyed records during the pendency of this litigation that might have aided in the identifying of the actual victims of discrimination. *See* Intervenors' Brief, p. 23. The record is devoid of any evidence of such destruction and, in fact, the evidence clearly indicates that the lack of evidence stems soley from the institutional procedures set up by Warner Robins prior to the initiation of this lawsuit. Being a frivolous argument, the court need not address it further.

In conclusion, the promotional relief provided for in the consent decree is designed to compensate actual victims of defendants' discrimination. While the identification process is not flawless, it is, in the court's best judgment, a reasonable and fair identification procedure designed to choose the most likely victims of discrimination. It is further clear that a plaintiff in a Title VII case is not required to establish with certainty the identity of every actual victim. *See International Brotherhood of Teamsters*, 431 U.S. at 371-72, and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976). The burden on a plaintiff is merely to establish the identity of the group of individuals at which the discriminating practice was directed. *Id.* This plaintiffs have clearly done. Once so identified, this group of individuals is, in turn, entitled to full compensatory relief, *i.e.*, the pro-

motions that they were otherwise entitled to but for the discrimination. By settling their dispute, plaintiffs have actually minimized the potential impact on Intervenors since it appears from all of the evidence that there were potentially more than 240 class members that were not promoted on the basis of race. For cases demonstrating this larger impact on Intervenors, *see United States v. Lee Way Motor Freight*, 625 F.2d 918, 935-36 (10th Cir. 1979) (wherein an employer had promoted eight apprentices, all white, to journeymen in the years between 1965 and 1972. Six identified victims were awarded vacancies. Lee Way objected on appeal that since only 8.5% of the area population was black, only one black would have been hired in the absence of discrimination, and, therefore, only one black should have been given a hiring preference. The Tenth Circuit rejected this argument holding that the decision in *Teamsters* required full relief to be provided all identified victims); *see also Mims v. Wilson*, 10 Fair Empl. Prac. Cas. (BNA) 1357, 1358 (N.D. Fla. 1973), *vacated*, 514 F.2d 106, 109 n.5 (5th Cir. 1975) (wherein the area population was only 7.2% black, and defendant employer employed fewer than 20 workers. The court held that providing relief to only two class members was improper because the relief provided stopped short of returning the black discriminatee to his "rightful place").

By limiting the number of promotions to the number of positions actually lost, the consent decree's relief has equitably balanced the difficulty of identifying all victims of discrimination through a lengthy trial with the interests of subsequent non-discriminatee applicants in being able to pursue their careers without being affected by any rightful promotional relief that is provided to these victims. The victim identification procedure is targeted to a pool of likely victims that has been formulated in such a way as to maximize the probability that the class members chosen were, in fact, victims. To the extent that the relief provided class members is either over or underinclusive is simply unavoidable due to the difficulty of victim identification in this case and due to Title VII's mandate that full compensatory relief be provided victims. *See generally*, Schnapper, *The Varieties of Numerical Remedies*, 39 STAN. L. REV. 851, 893-900 (1987). Further, the fact that less qualified discriminatees may be chosen over more qualified discriminatees is simply not a concern Intervenors may raise since they lack standing with regard to

that issue. Accordingly, because the court finds that the 240 special promotional positions is victim specific, Intervenors' contentions that this relief violates Title VII and the Constitution is simply meritless. The promotional relief is not only lawful, it is also a fair, adequate, and reasonable remedy for the class members when combined with the additional remedies provided for in the consent decree.

C. Alternative Rationale for Promotional Relief

While the court is fully persuaded that only identified victims of discrimination will benefit from the promotional relief provided for in the consent decree, the court alternatively finds that, even assuming that the promotional relief in this case is a purely race-conscious affirmative action program designed to benefit victim and non-victim class members alike, the relief so provided would still pass statutory and constitutional muster. Where, as in this case, plaintiffs have demonstrated a *prima facie* case of discrimination, non-victim race-conscious relief is clearly authorized under both Title VII and the Constitution. As already stated, in order for non-victim race-conscious relief to be permissible, the Supreme Court's most recent pronouncements clearly indicate that an affirmative action plan must merely be designed to eliminate work force imbalances in traditionally segregated job categories. *Johnson*, 92 L.Ed.2d at 630. Plaintiffs have presented numerous statistical studies of work force, grade levels, occupational segregation, promotions, training, supervisory appraisals, test scores, and awards that demonstrate pervasive patterns of discrimination in the internal promotional system at Warner Robins.[1] Given this factual background, the court can but only conclude that the requisite "manifest imbalance" has been amply shown by plaintiffs in this case. Finding this part of the test to have been met, the court must next address whether the promotional relief unnecessarily trammels the rights of white employees or creates an absolute bar to their advancement.

Where a race-preference program is justified by a need to remedy prior discrimination, the program itself must still be narrowly

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[1] These studies were based on either admitted facts, discovery documents, or Warner Robins' computer files.

tailored to the achievement of that goal. *See Wygant v. Jackson Board of Education*, 90 L.Ed.2d 260, 268, 272 (1986) (It is of central importance to equal protection under law that public distinctions between citizens on the basis of their race be narrowly and specifically framed to accomplish the stated remedial purpose). While the standard for evaluating challenges to plans appear to vary depending upon whether it is brought under Title VII or the Constitution, the primary concern under both analyses is that the remedial efforts must ensure fair treatment of whites and blacks, males and females. A review of the terms of the promotional relief is, therefore, necessary.

As already indicated, the promotional relief is ephemeral in nature. Once the promotions are made, no other special promotions are required. The process of filling the remaining 71 positions will probably take much less than a year, if the previous promotional rate continues,[2] and no further promotional relief is provided for in the decree. The plan is, therefore, of relatively short duration with minimal intrusion upon the generalized expectation of Intervenors in being promoted.[3]

The promotional relief is also flexible, and waivable in nature given the fact that promotions will be made to every other next available vacancy in the specified positions until the 240 specified positions have been filled. *Howard*, 597 F.Supp. at 1511. In addition, nothing in the consent decree requires Warner Robins to promote or otherwise place any person into a position for which that person is

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[2] In the ten months that the decree was in effect, 169 of the 240 special promotions were made.

[3] This court has previously found that Intervenors have no vested right or entitlement to a promotion under the Warner Robins promotion process. This court has found that:

> Warner Robins does not operate under a seniority system. A complicated computer ranking process screens all employees for potential promotions. No job announcements are posted. Employees do not apply for promotions, and no employee has an enforceable basis for considering himself as "next in line" for any future opening. Clearly, the Consent Decree does not impair any vested rights of [intervenor].

Howard v. McLucas, 597 F.Supp. 1501, 1503 (M.D. Ga. 1984).

not at least minimally qualified under the applicable federal standards, nor is the government required to make a promotion unless one is necessary. *Id.* The one for one requirement in this case does not require the layoff or discharge of any white employees. Rather, it merely postpones the promotions of a relatively few qualified whites to a limited number of specified positions. These same white employees may continue to seek a promotion in one of the target positions on an every other basis, as well as a promotion in any one of the other non-target positions at Warner Robins. For example, during the 22 months that the special registers were in use (from December 20, 1984, until the issuance of the Eleventh Circuit's mandate on October 23, 1986), there were 3,909 competitive promotions at Warner Robins. *See* Supp. Wooley Aff., ¶ 3. The 169 special promotions made during that period, therefore, comprised a mere 4.3% of the total number of promotions made to Warner Robins. Furthermore, the record further indicates that a majority of the Intervenors claiming eligibility for target positions have actually received promotions. These facts lead the court to conclude that the impact of the special promotions on Intervenors is relatively diffuse.

The promotional relief in the consent decree is also only directed to the various wage grades where pervasive discrimination has been shown. In these wage categories, the effect of defendants' discrimination has been to create a stigma upon the members of the plaintiff class that they are less than capable of performing the same work similarly performed by non-class members there at Warner Robins. By placing qualified class members into these positions as soon as possible, this stigma will dissipate, as will the likelihood of future discrimination. The court believes that the accelerated relief provided by the one for one promotional system is, therefore, plainly justified, especially when considering the decade-long delay that has occurred in this case, through no fault of the parties, but which has allowed the effects of discrimination to continue to pervade throughout the Warner Robins workforce. Under these circumstances, the court does not believe that a mere racial preference similar to the "Harvard Plan" would provide the full relief necessary to remove promptly the remaining vestiges of discrimination at Warner Robins. Nor has the court been presented with any other less intrusive approach that might

provide full relief to class members within a reasonable period of time.

After a full review of the evidence in this case and the objections of Intervenors, the court finds that the special promotional relief provided for in the consent decree does not violate either the Fifth Amendment to the Constitution or section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a)(1981), because it is based upon a predicate finding of discrimination by defendants and is victim specific. Further, to the extent the relief is not victim specific, it is still lawful since it is necessary to provide full relief to class members, it is flexible, waivable, and of limited duration; the number of positions offered is limited to the specific number of jobs statistically proven to have been lost to class members; and, finally, it does not unnecessarily trammel the rights of third parties or create an absolute bar to their advancement since the impact of the relief is relatively diffuse in nature and many promotional opportunities continue to exist for these third parties. Because the court has found the disputed promotional relief to be lawful, this court's previous findings that the non-promotional relief found in the amended consent decree is fair, adequate, and reasonable to the parties now requires that the entire decree as proposed be accepted by the court. Accordingly, FINAL APPROVAL should be an is hereby GRANTED. Fed.R.Civ.P. 23(c).

SO ORDERED, this 30th day of September, 1987.

/s/Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8817

D.C. Docket Nos. 75-168 & 79-66

MICHAEL HOWARD, et al.,

Plaintiffs-Appellees,

versus

JOHN L. McLUCAS, et al.,

Defendants-Appellees,

ROBERT POSS, et al.,

Intervenors-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

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Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Judgment of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

If is further ordered that intervenors-appellants pay plaintiffs-appellees and defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 27, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8817

MICHAEL HOWARD, et al.,

Plaintiffs-Appellees,

versus

JOHN L. McLUCAS, et al.,

Defendants-Appellees,

ROBERT POSS, et al.,

Intervenors-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion April 27, 1989, 11 Cir., 198_, __F.2d__).

(June 2, 1989)

Before RONEY, Chief Judge, CLARK, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and

a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

ORD-42

No. 89-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT POSS, *et al.*,
Petitioners-Appellants,
MICHAEL HOWARD, *et al.*,
Plaintiffs-Respondents,
v.
JOHN L. MCLUCAS, *et al.*,
Defendants-Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a consent decree that provides promotions to victims of discrimination violates Title VII or the Constitution in a case in which the lower courts found pervasive *prima facie* racial discrimination?

2. Whether two courts below correctly found that the promotional provision was narrowly tailored "to eliminate the effects of past discrimination"?

LIST OF ALL PARTIES

Plaintiffs-Respondents

Michael Howard, Henry Taylor, Jr., Oliver Gilbert, Clifford Scott, Lewis T. Jones, and Thomas W. Miller, on behalf of themselves and all others similarly situated, and the American Federation of Government Employees and Irish Smith.

Defendants-Respondents

John L. McLucas, Secretary of the Air Force; Major General W.R. Hayes, Commander of Warner Robins Air Force Base and Administrator of Warner Robins Air Logistics Center; Robert Hampton, Chairman of the United States Civil Service Commission; Ludwig U. Andolsek, Commissioner, United States Civil Service Commission; Jayne B. Spain, Commissioner, United States Civil Service Commission.

Petitioners-Intervenors

Larry W. Abney, Dennis Adams, David Alford, Eddie C. Barfield, Katherine H. Barkemeyer, William H. Barkemeyer, Joseph N. Barlow, Howard Bell, Kathleen Bell, Paul E. Benton, Wayne A. Bowden, Johnny D. Bowen, Goldie Bright, Kenneth W. Brock, Ronald K. Brown, Billy W. Bryant, Linda Burnsed, Donald R. Buttorm, Kenneth R. Camp, Barney Chandler, James B. Chappell, Deanna Chase, Mary M. Clance, Robert L. Clance, Dave Cochran, Bill Cody, Robert R. Collins, Rusty Combs, Charles R. Cook, Martha J. Cook, Donald C. Crosby, Eugene A. Davis, Jim Davis, Kyle C. Dismuke, David Dixon, Marvin T. Drew, John E. Dunn, John A. Dunwoody, Joyce DuVernois, Donald Easler, Dale Edge, Charles F. Evans, John J. Evans, Billy S. Evatt, George Everette, Roger W. Ferguson, Jay A. Fitzgerald, Ronald A. Garrett, David C. Gilstrap,

Braxton B. Grantham III, Robert Gray, Sheree W. Griffin, Rita Hall, Jimmy Hamlin, Jackie R. Hammock, William H. Hargrove, Albert L. Harrison, Charles C. Harrison, Ferman Hatton, Michael G. Haynes, Willie Heath, William F. Herring, Jr., Dale A. Hoffman, Glynn Hooks, David L. Horton, Cecil W. Hughes, Charlotte A. Jackson, William C. Johnson, Jr., Danny L. Joiner, Robert W. Kelly, Robert E. Knodrak, Hugh Lewis, Billy Joe Little, Calvin H. Lowery, Paula B. Malone, Richard L. Marks, Leon Mathis, Randall R. Maxwell, Stephen D. Mayo, William C. McLemore, Clayton Mead, Michael C. Mead, Beverly R. Meredith, Lelan S. Middleton, Donna W. Mills, James A. Minor, Wayne E. Minor, Robert W. Minter, Fred M. Mitchell, Lenwood W. Moore, Roger Morrow, Cheri L. Moss, Marion Ford Musselwhite, Richard L. Nash, Tommy Parker, Tarrell T. Parkerson,

Johnny Peacock, M. Louise Peterman, Timothy Peters, Donald Peterman, Charles W. Phillips, Earl J. Pilgrim, Charles Porter, Robert T. Poss, Thomas Purvis, Robert R. Reese, June Renfroe, Robert R. Riggins, Jr., Gary T. Roberson, Rebecca L. Scribner, Grady W. Selph, Robert Shiver, Lillian N. Slappey, Richard J. Stafford, Jimmy L. Stanley, James H. Stephens, Melba Stokes, Ronald Strickland, Sue Sullivan, Jimmie L. Thomas, Shirley A. Thomas, Charles S. Vann, Frederick Veator, Richard A. Wall, James A. Wallace, Herbert Weaver, Herman B. West, Jr., Jim Wilcox, Larry H. Wilkes, Charles E. Williams, Jr., Irene K. Wilson, James E. Woodard, Jr., Ronnie Norman Woods, David Wynne, Jimmie Yawn, Hugh L. Yawn, and Martin A. Young.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 871 F. 2d 1000 (1989) and is reprinted in Appendix A of the Petition. The opinion of the United States District Court for the Middle District of Georgia of September 30, 1987, as supplemented October 5, 1987, is reported at 671 F. Supp. 756 (1987). Petitioners reprinted the incomplete opinion in their Appendix B. Respondents will refer to the complete published district court opinion instead of Appendix B.

No. 89-387

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

ROBERT POSS, et al.,
Petitioners-Appellants

MICHAEL HOWARD, et al.,
Plaintiffs-Respondents,

v.

JOHN L. McLUCAS, et al.,
Defendants-Respondents

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Respondents Michael Howard, et al., plaintiffs below, request that the petition for writ of certiorari filed by intervenors Robert Poss, et al., be denied.

STATEMENT OF THE CASE

A. Prior Proceedings

This Title VII action was originally filed on October 31, 1975 by black civilian employees of the Warner Robins Air Logistics Center ("Warner Robins") against defendant Secretary of the Air Force to challenge the denial of promotions to black employees. With approximately 15,000 civilian employees, Warner Robins is one of the largest employers in the State of Georgia. In 1976 the lawsuit was certified as a class action on behalf of approximately 3200 black employees.

After numerous pre-trial proceedings and extensive discovery, the parties submitted a proposed consent decree. A fairness hearing was held pursuant to Rule 23 of the Federal Rules of Civil Procedure in August 1984. The district

court received extensive evidence of discrimination, and found that "plaintiffs have made out a prima facie case of employment discrimination through the use of statistical evidence of disproportionate racial impact," Howard v. McLucas, 671 F. Supp. 756, 760 (M.D. Ga. 1987), by "present[ing] numerous statistical studies of work force, grade levels, occupational segregation, promotions, training, supervisory appraisals, test scores, and awards that demonstrate pervasive patterns of discrimination in the internal promotional system at Warner Robins." Id. at 766. The district court also received evidence of the nature and effect of the promotional relief provided by the consent decree. Id. at 761-68.

Robert Poss and 136 other white employees objected and were allowed to

participate in the fairness hearing as objectors. See Howard v. McLucas, 597 F. Supp. 1512, 1514 (M.D. Ga. 1984). Their counsel argued, presented evidence and examined witnesses. The court, however, denied their motion to participate formally as intervenors with the right to veto the settlement. Howard v. McLucas, 597 F. Supp. 1501 (M.D. Ga. 1984). Several class members also objected. Rejecting the objections of both black and white employees, the district court approved the consent decree.

The consent decree states that the promotion of 240 class members to every other available vacancy in specified jobs settled the claims of class members who alleged that they were victims of discrimination. See R. 256 at 6. Members of the class were selected for promotion through a victim identification

procedure, which the district court found identified those most likely to have been denied promotions on discriminatory grounds. The consent decree also provided for a $3.75 million class backpay fund and other injunctive relief.

In 1986, the Eleventh Circuit reversed the district court's denial of the white employees' motion to intervene. The court of appeals authorized intervention of Poss and the other white employees, but expressly limited their participation to challenging the promotional provision. Howard v. McLucas, 782 F.2d 956, 960-61 (11th Cir. 1986). The court denied authorization to intervenors to continue to challenge any other remedial provisions or to contest the district court's underlying findings of discrimination.

After considering the intervenors'

and parties' submissions on remand, the district court rejected intervenors' objections, which are reiterated in their petition. The court approved the decree "because it is based upon a predicate finding of discrimination by defendants and is victim specific." 671 F. Supp. at 767-68. The court also found that, to the extent the relief is not victim specific, it was narrowly tailored to eliminate the discrimination found. Id. at 768. The court of appeals affirmed on the same grounds. Pet. 10a-20a. Motions for a stay were denied by the Eleventh Circuit and this Court. En banc review was denied by the Eleventh Circuit. Pet. D.

Although petitioners fail to acknowledge the victim-specific nature of the promotional relief, two courts below upheld the decree precisely because it is victim specific. E.g., 671 F. Supp. at

766 ("[T]he court is fully persuaded that only identified victims of discrimination will benefit from the promotional relief."). Petitioners also fail to acknowledge that intervenors' objections that the promotional procedure was not narrowly tailored to eliminate discrimination were rejected by both courts below.[1]

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[1]On remand, intervenors were given a plenary opportunity to challenge the promotional provision. They failed to show that "any of the plaintiffs were not discriminated against." Pet 19a; see 671 F. Supp. at 764. None of the intervenors, moreover, presented any evidence that he or she had been injured in any way by operation of the promotional provision. Pet. 2a. The district court found that the intervenors presented no evidence of injury, and that 43 of the 137 intervenors had been promoted and another 56 were ineligible for promotion. 671 F. Supp. at 767 n. 4. The court of appeals found that, none presented evidence of any delay in receiving promotions. Pet. 9a. Notwithstanding intervenors' "tenuous" position to contest the consent decree, the courts below addressed the merits because "some delay may have occurred." Id.

B. FACTS

1. Record of Discrimination

The petition suggests that the promotional provision was based on a single statistic showing a disparity. This is incorrect. The lower courts found that a prima facie case had been proved with extensive statistical evidence of pervasive discrimination. Pet. 4a-5a, 671 F. Supp. at 760-61, 766.

Warner Robins for many years has filled upper level jobs by promoting qualified employees in lower level jobs through an internal promotion system on the basis of seniority, written examinations, supervisory appraisals, training, and awards. 597 F. Supp at 1508-09.[2] Nevertheless, the record shows

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[2]This case, therefore, is unlike Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which higher level jobs were filled through outside recruitment rather than internal promotion.

that blacks "were concentrated in low level jobs and certain occupations." Pet. 4a, quoting 597 F. Supp at 1513. In 1973, when plaintiffs' administrative charges were filed, fully three quarters of black WG employees were in the lowest job levels, compared to less than a third of the white WG employees. See Pet. 4a, 671 F. Supp. at 760. Blacks were concentrated in menial occupations with little advancement potential. Although only 15% of the Warner Robins workforce, blacks constituted 86% of all janitors, 81% of all laborers, 76% of all packers, 76% of all motor vehicle operators, 71% of all woodcrafters and 67% of all parts and equipment operators. See Pet. 4a.

Statistics also "demonstrated that black employees were promoted ... in proportions less than their representation in the workforce or in lower grades."

Pet. 4a, 671 F. Supp. at 760, quoting 597 F. Supp at 1510. Plaintiffs compiled two statistical analyses of promotions, which were introduced by stipulation. See 597 F. Supp. at 1508 n. 1. The first showed that significant statistical disparities in promotion rates out of WG grade groups and GS grades 1-4, and that blacks lost 553 jobs from 1971-78.[3] The second analysis, more conservative because it

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[3]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	6.01	67.98
WG 5-8	16.03	362.00
WG 9-12	4.80	50.06
GS 1-4	3.56	72.67

See Pet. 4a, 671 F. Supp. at 760, 597 F. Supp. at 1610. Fluctuations of more than two or three standard deviations undercut the hypothesis that selections for promotions were being made randomly with respect to race. See Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977).

controlled for occupational series,[4] showed statistically significant disparities in WG categories, but no significant disparities in GS jobs. The conservative analysis showed blacks lost 234 jobs.[5]

Defendant Warner Robins also prepared an analysis of promotion statistics for trial, which plaintiffs summarized. The government's submission showed statistically significant disparities out of WG jobs and concluded that blacks lost

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[4]The record, however, indicates that employees in different series were qualified to be promoted to the same job. See R. 275, Tab E (government exhibit showing large pools of qualified employees for particular positions).

[5]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	3.53	36.68
WG 5-8	8.19	162.84
WG 9-12	3.75	34.74

See Pet. 4a, 671 F. Supp. at 761.

328 positions.[6]

All the selection criteria used by Warner Robins, with the exception of seniority, had significant adverse impact on black employees. Id. See R. 285 at 40-41; R. 156, 28-37; R. 269, §§3d-h & k; R.268, Exhibit 1, 47-73, 100-07. For instance, while fluctuations of more than two or three standard deviations are sufficient to undercut the hypothesis that a selection device has a racially random effect, the passing scores of black employees on written examinations varied by as much as 50 standard deviations from those of white employees. R. 268, Exhibit 1 at 100; see id. at 100-07. Government

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[6]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	4.60	70.98
WG 5-8	9.50	209.72
WG 9-12	4.29	46.53

R. 268, Exhibit 1, 85.

documents admitted the adverse impact. Warner Robins' EEO affirmative action plans stated that disparities in training were a "problem": For example, "[m]inorities received a disproportionate share of training in CY 1973 -- 7% of the total compared to their 15.2% population." R. 156, 30, 3a (admission). The 1976 affirmative action plan stated that "[l]ower appraisals for . . . minorities result in reduced promotional opportunities." See id. at 32, 3a (admission). EEO documents show consistent racial disparities in awards given to employees, which "no doubt reflects in the promotion figures where awards are ranking factors." See id. at, 38, 4a (admission).

The finding by the lower courts of unrebutted evidence showing prima facie discrimination in denial of promotions was

amply supported. That unrebutted evidence was thus "sufficient evidence to justify the conclusion that there has been prior discrimination." Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986).[7]

2. The Promotional Provision

The district court found that class members identified for the 240 promotions were likely to have been eligible for the same promotions during the period when the discriminatory policies were in force, and, therefore, were "likely victim[s] of discrimination entitled to relief." 671 F. Supp. at 764, see id. at 763. "A more specific way of identifying these actual

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[7]Intervenors attach great weight to the fact that Warner Robins did not concede liability in the consent decree. Interveners ignore, however, that Warner Robins stipulated that the statistical disparities cited above, that undergird the prima facie discrimination findings, were true and correct. See 671 F. Supp. at 766 n.1; 597 F. Supp. at 1511 n. 1, 1513; R. 285 at 8-11, 40-41.

victims does not exist in this case." Id. at 763.

Because of Warner Robins' promotional system and record-keeping procedures, it was impossible to identify all employees who were actually qualified for promotion to jobs lost to blacks in the 1971-79 period, or even to reconstruct their qualifications at the time.[8] The supervisory appraisals and test scores of specific employees in the period are unavailable or incomplete. Pet. 3a-4a. It was also impossible to definitively rank the best qualified employees because all the then-existing criteria used for determining qualification, except

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[8] All employees were considered for promotion through a computerized ranking process in which qualifying criteria of employees were automatically assessed as vacancies came up. 597 F. Supp. at 1509. Warner Robins does not use the more usual announcement or posting system in which employees apply for promotions. 597 F. Supp. at 1508.

seniority, were shown to be discriminatory.

The parties used plaintiffs' conservative promotional analysis to identify the number of promotions lost to blacks and the specific jobs most likely to have been lost to blacks.[9] The parties then used the contemporaneous and only available computerized ranking of eligible class members present in the workforce during the relevant period in order to identify specific victims. Seniority and supervisory appraisal scores were used, but seniority, the only non-

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[9]671 F. Supp. at 762 (The 240 positions "represent, to the best extent possible, the most likely jobs lost to blacks from 1970 through 1979 as a result of the discrimination at Warner Robins."); 597 F. Supp. at 1513-14 ("Plaintiffs' computer-based promotional analysis for occupational series was actual evidence that approximately 240 promotions were lost to black WG employees . . . [T]he positions to be filled by blacks should have been filled by blacks years ago.").

discriminatory criteria, was given greatest weight.

The district court, therefore, had an ample basis to find that "the victim identification process . . . [was] a reliable and narrowly tailored process designed to assure that only victims of discrimination be afforded relief." 671 F. Supp. at 764 (emphasis added).

The district court heard and rejected intervenors' objections to the scope of the promotional provision. The court found that "to the extent the relief is not victim specific, it is still lawful since it is necessary to provide full relief to class members, it is flexible, waivable, and of limited duration; the number of positions offered is limited to the specific number of jobs statistically proven to have been lost to class members; and, finally, it does not unnecessarily

trammel the rights of third parties or create an absolute bar to their advancement since the impact of the relief is relatively diffuse in nature and many promotional opportunities continue to exist for these third parties." 671 F. Supp. at 768.

The court expressly found that there was no "less intrusive approach that might provide full relief to class members within a reasonable period of time." Id. at 767. The court, therefore, had substantial basis to conclude that the decree was narrowly tailored to eliminate prior discrimination.

REASONS TO DENY THE WRIT

I

The Courts Below Correctly Applied The Law Of This Court In Upholding A Consent Decree That Provides Relief To Specific Victims Of Discrimination Based On A Showing Of Pervasive Prima Facie Discrimination.

Petitioner intervenors assert that this case presents the important federal question whether an affirmative action set-aside can be justified by a mere underutilization of blacks. Pet. 11. This contention fails for two reasons: Petitioners initially claim that the only factual predicate for the promotional measure is "a statistical underutilization of blacks." The courts below found pervasive prima facie discrimination on the basis of a substantial record. Such a statistical showing "proved a prima facie case of systematic and purposeful

employment discrimination," International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 (1977). Second, petitioners claim that the promotional provision in question is an affirmative action program for employees who were not victims of discrimination. As the two lower courts correctly found, however, the promotions are specific relief for 240 victims of discrimination. Moreover, "[i]ntervenors have failed to show that any of these class members were not victims of defendants' discrimination." 671 F. Supp. at 764.

The instant case simply does not concern the permissible scope of affirmative action. The defining characteristic of affirmative action plans is that they are not confined to providing relief to actual victims of discrimination. See Local 28, Sheet

Metal Workers v. EEOC, 478 U.S. 421, 474 (1986) ("The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of discrimination and to prevent discrimination in the future . . . . [B]eneficiaries need not show that they were themselves victims of discrimination"); Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986) ("courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices"); Firefighters v. Stotts, 467 U.S. 561, 579 (1984) (observing that the plan under review was supported by "no finding that any of the blacks protected from layoff had been a victim of discrimination").

As the Court noted in Regents of University of California v. Bakke, 438 U.S. 265, 301 (1978), "some burdens on other employees" and "various types of racial preferences" were tolerated in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and other employment discrimination cases. Such victim-specific provisions, however, were distinguishable from similar measures in affirmative action programs because they were "held necessary '"to make [the victims] whole for injuries suffered on account of unlawful employment discrimination"'" and were "remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." Bakke, 438 U.S. at 301 (quotations omitted).

This Court long ago held that a

central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); see Local 28, Sheet Metal Workers v. EEOC, 478 U.S. at 471 (individual "make whole" relief is not the only kind of remedy available under Title VII). The "make whole" purpose of Title VII is consistent with the historic purpose of the Civil Rights Acts to secure complete justice for victims of racial discrimination. "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965).

Relief to individual victims of

discrimination is justified on the record. A finding of pervasive, classwide discrimination such as the district court made in this case is an appropriate basis for relief to individual class members. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1799 (1989) (O'Connor, J., concurring) ("Because the class has . . . demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer 'to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons.'") (citations omitted). The law is settled that "[b]y 'demonstrating the existence of a discriminatory . . . pattern and practice' the plaintiffs ha[ve] made out a prima facie case of discrimination against the individual class members.'" Teamsters, 431 U.S. at

359, quoting Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976). "[P]roof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief." Teamsters, 431 U.S. at 359 n. 45.

Courts, moreover, have recognized that the process of recreating the past, for example, in order to identify victims of discrimination, "will necessarily involve a degree of approximation and imprecision." Teamsters, 431 U.S. at 372. See Segar v. Smith, 738 F.2d 1249, 1289 & n.36, 1290 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979). While individualized hearings are "usually" required, Teamsters, 431 U.S. at 361, they are not mandatory "when the

class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over a extended period of time calls forth [a] quagmire of hypothetical judgment[s]." Pettway, 494 F.2d at 261. See Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984); Segar, 738 F.2d at 1290; Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); Association Against Discrimination in Employment, Inc., v. City of Bridgeport, 479 F.Supp. 101, 115 (D. Conn. 1979), aff'd, 647 F.2d 256 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982). In the instant case, the challenged remedy employed the best method possible under the circumstances to identify victims of pervasive promotional discrimination. See 597 F. Supp. at 1504

("The present parties have labored to reconstruct the record of thousands of personnel actions and have identified as best as possible the actual impact of past discrimination").

Assuming arguendo that the promotional provision is not a victim-specific remedy but an affirmative action remedy for nondiscriminatees, the measure is, nevertheless, appropriate. The lower courts' findings of prima facie discrimination are based on separate showings of promotional disparities and the adverse impact of a broad range of promotional criteria, buttressed by admissions in Warner Robins' affirmative action plans. This record of "persistent or egregious" discrimnation or "lingering effects of pervasive discrimination," Local 28, supra, 478 U.S. at 476, as the Eleventh Circuit properly held, showed

"that the government had a sufficient basis for concluding that remedial action was necessary." Pet. 13a. In so finding, both lower courts specifically measured the promotional provision against the legal principles set forth in the Court's recent affirmative action decisions under Title VII and the Constitution. E.g., United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987); Local 28, 478 U.S. 421; Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). The lower courts found not only a "manifest imbalance" in "traditionally segregated job categories", Johnson, 480 U.S. at 631; United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979), but "sufficient evidence to justify the conclusion that there has been prior discrimination." Wygant, 476 U.S. at 277. See Paradise, 480 U.S. at

167 ("The government unquestionably has a compelling interest in remedying past and present discrimination"). Wygant, 476 U.S. at 286 (O'Connor, J., concurring) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a [governmental] actor is a sufficiently weighty [governmental] interest to warrant the remedial use of a carefully constructed affirmative action program". The record in this case, therefore, justifies race conscious relief.

The particular form of race conscious relief, the set aside of 240 promotions, is fully commensurate with the prima facie case, and was found to be the only measure under the circumstances that "would provide the full relief necessary to remove promptly the remaining vestiges of

discrimination at Warner Robins". Pet. 15a; 671 F. Supp. at 767. Review on Certiorari, therefore, is inappropriate.

II

The Lower Courts Correctly Decided That The Promotional Provision Was Narrowly Tailored "to Eliminate the Effects of Past Discrimination."

Petitioners assert that the Eleventh Circuit failed to consider race neutral alternatives and that the promotional provision was not narrowly tailored. With respect to the first assertion, petitioners had an opportunity to present alternatives both at the Rule 23 fairness hearing and subsequently on remand from the Eleventh Circuit. On neither occasion did they present any race-neutral proposals.[10] That omission is understandable: Warner Robins, as petitioners point out, has had an affirmative action program, pursuant to

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[10] See Johnson v Transportation Agency, 480 U.S. at 628; Wygant v. Jackson Bd. of Education, 476 U.S. 277-78 (burden of proof on intervenors to show unconstitutional violation of Title VII).

which the kinds of race-neutral measures petitioners now propose were employed. See 41 CFR 60-2.20-2.26. Warner Robins' affirmative action reports admitted that, notwithstanding these efforts, patterns of prima facie discrimination occurred. The parties, therefore, were correct in assuming that race-neutral measures of the kind petitioners espouse now would have been ineffective.

With respect to narrow tailoring, the lower courts gave petitioners a full opportunity to make their case and rejected their factual contentions that the promotional provision could have been more narrowly drawn. Pet. 15a-19a; 671 F. Supp. at 766-67. These twice-rejected contentions are neither meritorious nor appropriate for certiorari. See, Blau v. Lehman, 368 U.S. 403, 411 (1962). They merely seek to enlist the Court in

reviewing evidence and discussing specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); see Anderson v City of Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

The courts below properly found that the promotional relief was necessary and that other proposed remedial alternatives were not feasible. Pet. 16a; 671 F. Supp. at 767. "The flexibility and short duration of the promotional relief cannot seriously be called into question." Pet. 17a, 671 F. Supp at 766-67. "The 240 special promotions do not represent or achieve any aggregate proportionality" or numerical goal. Pet. 17a. The impact of the provision is "relatively diffuse" and spread throughout the workforce. Pet. 18a,

671 F. Supp. at 766-67. They constitute only 4.3% of the total Warner Robins promotions. Pet. 7a; 671 F. Supp. at 767. The best method of determining the actual victims of discrimination was utilized. Pet. 19a; 671 F. Supp. at 766-67. Two courts below made extensive findings that "[w]hile the identification process is not flawless, it is, in the court's best judgment, a reasonable and fair identification procedure designed to choose the most likely victims of dis-crimination," in light of the available documentary sources and peculiarities of the Warner Robins promotional process. 671 F. Supp. at 765. Petitioners' contentions, including the claim that the government "willfully destroyed records during the pending of this litigation", Pet. 36a, were properly rejected as incorrect and frivolous. 671 F. Supp. at 763-65.

CONCLUSION

The petition for writ to the Eleventh Circuit should be denied.

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No. 89-387

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT POSS, ET AL., PETITIONERS

v.

MICHAEL HOWARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioners' challenge to a consent decree that was based upon a finding that the plaintiffs had established a prima facie case of racial discrimination and that provided relief, insofar as possible, only to identified victims of racial discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 871 F.2d 1000. The opinion of the district court (Pet. App. 23a-41a) is reported at 671 F. Supp. 756. An earlier opinion of the court of appeals is reported at 782 F.2d 956. Earlier opinions of the district court are reported at 597 F. Supp. 1501 and 1504.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on April 27, 1989. A petition for rehearing was denied on June 2, 1989. Pet. App. 45a-46a. The petition for a writ of certiorari was filed on August 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Plaintiffs, a class of black employees employed at Warner Robins Air Logistics Center (Warner Robins), located near Macon, Georgia, filed this action on October 31, 1975, seeking injunctive and monetary relief to remedy alleged discriminatory promotion practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. In 1976, the district court certified the lawsuit as a class action on behalf of approximately 3,200 black employees.

In 1984, after substantial pre-trial proceedings and extensive discovery, the parties submitted to the district court a proposed consent decree terminating the action. At a fairness hearing held pursuant to Fed. R. Civ. P. 23, the district court received extensive evidence of past discrimination and concluded that plaintiffs had shown a prima facie case of employment discrimination through the use of statistical evidence of disproportionate racial impact. *Howard* v. *McLucas*, 597 F. Supp. 1504, 1513 (M.D. Ga. 1984). According to that evidence, while blacks comprised 14% of the workforce at Warner Robins in 1973, they then held only 3.3% of supervisory positions there. Pet. App. 13a. The record also showed that black employees were employed disproportionately in low level positions and that they remained in those positions longer than white employees. *Ibid*. The evidence showed that black employees were promoted in proportions less than their representation in the workforce or in lower grades of employment at Warner Robins. *Id*. at 4a.

Because candidates for competitive positions at Warner Robins during the period of alleged discrimination (1971-1979) were identified through a skills locator system, candidates were not required to apply for promotions. Pet. App. 3a. A computer automatically considered all minimally

qualified candidates for each vacancy and selected the top candidates based upon various criteria. *Ibid.* Ordinarily, employees were not notified when vacancies occurred or if they were considered but not selected to fill a vacancy. This system made identification of the specific victims of discrimination impossible. *Ibid.*

2. In an effort to settle this lawsuit, which had been in litigation for nine years at that time, the parties fashioned a victim-specific remedy for the alleged discrimination in promotions, and included it in a proposed consent decree. The proposed consent decree provided $3.75 million in backpay to a class consisting of qualified blacks employed at Warner Robins during the 1971-1983 period. Pet. App. 5a. The proposed decree also established a system in which a limited number of anticipated promotions would be filled over a two-year period from a list of qualified black employees who had been employed at Warner Robins and were the most likely victims of discrimination during the 1971-1979 period. *Id.* at 5a-6a & n.5.

Based upon a conservative promotional analysis prepared by plaintiffs, the parties identified 240 promotions most likely to have been lost to class members and identified 38 specific source grades in which discrimination had most likely occurred. Pet. App. 5a.[1] To ensure that this portion of the decree benefited actual victims of discrimination, the parties restricted those persons eligible to receive one of the 240 promotions to employees who began employment at Warner Robins before January 1, 1980. *Id.* at 34a. To further lessen the impact of this aspect of the decree on third

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[1] The 240 promotional opportunities affected by the proposed consent decree constituted a small fraction of the total of 3,600 anticipated vacancies overall and 1,600 projected vacancies in the job classifications from which the 240 promotional opportunities were drawn. Pet. App. 40a.

parties, the proposed consent decree stipulated that the promotions to class members would be made for every other next available vacancy in the specified positions until all the promotional relief had been completed. *Id.* at 5a-6a. Thus, every second vacancy arising in the specified positions would remain available to any qualified candidate. Furthermore, class members promoted under the decree were required to satisfy applicable standards for the position under Federal Civil Service rules, regulations, and qualifications standards. *Id.* at 5a.

3. Petitioners are 137 white employees at Warner Robins who objected to the proposed consent decree and presented their objections at the fairness hearing. *Howard* v. *McLucas*, 597 F. Supp. 1501, 1504 (M.D. Ga. 1984). The district court allowed petitioners' counsel to participate fully at that hearing by presenting evidence and argument and examining witnesses, but the district court denied petitioners' motion to participate as intervenors. Pet. App. 6a. Rejecting petitioners' objections that the relief was overbroad, as well as objections by some class members that the relief did not go far enough, the district court approved the consent decree and entered a final judgment. *Ibid.*

Petitioners appealed from the district court's denial of their motion to intervene, and the court of appeals reversed, ruling that petitioners had a limited right to intervene. *Howard* v. *McLucas*, 782 F.2d 956 (11th Cir. 1986). The court vacated those portions of the consent decree that had not yet been implemented, and remanded the case for further proceedings. *Ibid.*[2] After allowing the petitioners to intervene on a limited basis and permitting further discovery,

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[2] At the time the Eleventh Circuit issued its mandate in *Howard I*, the Air Force had already made 169 of the 240 promotions to class members under the consent decree. Pet. App. 21a.

the district court considered and rejected petitioners' motion to set aside the promotional components of the proposed consent decree, adopted the decree, and entered final judgment. Pet. App. 7a-8a. On appeal, the court of appeals affirmed, upholding the decree against petitioners' claims that it violated their right to equal protection under the Fifth Amendment and exceeded the relief available under Title VII. Pet. App. 10a-20a.[3]

ARGUMENT

1. Petitioners urge this Court to review the question "[w]hether a consent decree which sets aside promotional positions solely for blacks based upon a predicate of a statistically significant underutilization of blacks violates Title VII and the Constitution." Pet. i, 11. This case, however, is not an appropriate vehicle to address that question, for several reasons.

To begin with, the predicate for the entry of the consent decree was not, as petitioners state, simply evidence of "a statistically significant underutilization of blacks." Rather, both the district court and the court of appeals found that the statistical evidence in this record showed that the plaintiffs had established a prima facie case of discrimination, Pet. App. 13a-14a, 27a-29a, of the type that this Court had previously found adequate to support a race-conscious remedy. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 (1977); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976).[4] Second, there is no con-

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[3] The court subsequently denied a petition for rehearing and a suggestion for rehearing en banc. No member of the court asked for a poll on the question whether en banc rehearing was appropriate. Pet. App. 45a.

[4] In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), upon which petitioners rely, the Court found that the record did not

flict among the circuits on the question addressed by the lower courts. The decision below is consistent with the Second Circuit's decision in *Kirkland* v. *New York State Dep't of Corrections*, 711 F.2d 1117, 1130-1131 (1983), cert. denied, 465 U.S. 1005 (1984), and petitioners have cited no court of appeals' decision to the contrary.

Moreover, petitioners mistakenly suggest that the consent decree set aside promotional positions solely on the basis of race. Under that decree, only certain members of the class are eligible to receive affected promotions. While only black employees are eligible for the promotions under the decree, the decree requires that the promotee have been employed at Warner Robins between 1971 and 1979 in a position that was likely to have been affected by discriminatory promotional practices alleged by plaintiffs, and that he is fully qualified for appointment to the position at the time of his promotion. Pet. App. 34a-35a. Thus, while the remedy petitioners challenge was race-conscious, it was not a remedy that made promotions available to persons on the basis of race alone.[5]

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establish a prima facie case of discrimination by the private construction industry in Richmond, much less any discrimination by the city itself. *Id.* at 724. Here, the lower courts found a prima facie record of discrimination by the Air Force. In addition, the lower courts' decisions were handed down in an unusual factual context. Warner Robins's promotional scheme used a skills locator system, in which every employee was automatically considered for every vacancy, rather than an announcement system, under which employees must apply for a promotion. Accordingly, there were no applicants for promotions, and employees were not notified that vacancies existed or that they had been passed over for promotion. There were also no records kept showing the employees who were considered for a specific job promotion. 597 F. Supp. at 1509, 1514.

[5] Thus, this case resembles the relief stage of a case involving a *Teamsters*-style relief hearing, where one must be a member of the affected class to be eligible. See also *Johnson* v. *Transportation*

In suggesting that this Court review the constitutionality of the consent decree as an affirmative action plan, petitioners overlook the fact that the consent decree was not an affirmative action plan but was instead an effort to craft a victim-specific remedy for past discrimination at Warner Robins. Pet. App. 19a. See *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 474 (1986). In this case, as the court of appeals noted, "the district court first held that the promotional relief was not unlawful because it provided a remedy to actual victims of discrimination." Pet. App. 7a.

2. Alternatively, petitioners urge this Court to grant review to consider whether the consent decree was narrowly tailored so as to comport with Title VII and the Constitution. Pet. 21. The record here shows that this contention lacks merit and therefore does not warrant review.

Petitioners assert that the promotional relief in the consent decree was not narrowly tailored because it was not confined to the actual victims of discrimination.[6] Both courts below explained, however, that, given the nature of the Warner Robins promotion system, the decree was designed to afford relief only to actual victims of past discrimination insofar as that was possible under the cir-

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Agency, 480 U.S. 616 (1987) (membership in the disadvantaged class of women was only one of several factors upon which employment decisions would rest under an affirmative action plan).

[6] Although petitioners claim that the court of appeals should have reviewed this question de novo, it properly reviewed the decree for abuse of discretion. See *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 481 (6th Cir. 1985), aff'd *sub nom. Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). In addition, once the prima facie case of discrimination was established, petitioners had the burden of proof to show that the remedy proposed was unconstitutional. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277-278 (1986) (plurality opinion).

cumstances, a finding petitioners were unable to challenge as to a single class member. Pet. App. 19a, 38a. The fact that in these unusual circumstances there necessarily remained some degree of uncertainty as to the identity of the actual victims of past discrimination does not invalidate the decree. See *International Bhd. of Teamsters*, 431 U.S. at 372. The district court was entitled to broad discretion in approving the decree because of its first-hand experience with the parties and its familiarity with the voluminous record upon which they based this settlement.

Petitioners' specific charges against the approval of this consent decree by the courts below also lack merit. Petitioners claim that the district court did not consider race-neutral remedial action as an alternative to the promotional relief adopted. Pet. 22-24. But petitioners did not urge the district court to adopt specific race-neutral alternatives in lieu of the provisions in the consent decree. The district court therefore did not abuse its discretion on this count. Moreover, petitioners overlook the fact that the Air Force used a variety of race-neutral measures at Warner Robins to combat discrimination from 1971 to 1979. The prima facie showing that those race-neutral measures did not prevent discrimination in promotions from occurring suggests that such measures were not a wholly satisfactory remedy for past discrimination. Both courts below rejected the proposals that petitioners urged as a substitute for the promotional portion of the decree on the ground that less intrusive approaches were not workable or would not provide the plaintiffs with full relief within a reasonable time. Pet. App. 16a, 40a-41a. The courts below found that the decree provided a flexible plan of short duration that would have only a relatively diffuse impact on third parties, including petitioners. *Id.* at 18a, 39a-41a.[7] Those fact-bound determina-

[7] For example, the decree set aside only 240 promotions for members of the plaintiff class, which constitutes only [redacted] a small percentage

tions do not warrant further review. Under these circumstances, this case is an inappropriate vehicle to resolve the broad remedial issues that petitioners raise.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the total number of Warner Robins promotions. Pet. App. 7a, 23a. Once those promotions are made, no others are required. *Id.* at 39a. In the ten months that the decree was in effect, 169 of the 240 promotions were made, and the district court expected that the remaining 71 positions would be filled in much less than one year. *Id.* at 39a & n.2. And of the 137 named intervenors, 43 had been promoted and 56 were not eligible for promotions to the target positions for one reason or another. *Id.* at 8a n.6.

[8] The court of appeals concluded its analysis by acknowledging that the legal grounds on which it based its opinion "may be considered dicta" because its prior decision "arguably foreclosed" petitioners' contention that the plaintiffs had made an inadequate showing of past discrimination. Pet App. 20a.

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